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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF COLORADO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

The United States is currently responding to the release and threatened release of hazardous substances at the Department of the Army's Rocky Mountain Arsenal pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* The question presented is whether the State of Colorado may simultaneously dictate hazardous substance response activities at the site pursuant to state law.

PARTIES TO THE PROCEEDING

The United States of America is the petitioner. The State of Colorado and the Colorado Department of Health are respondents.

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STATE OF COLORADO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-40a) is reported at 990 F.2d 1565. The memorandum opinion and order of the district court (App., *infra*, 41a-52a) and the judgment of the district court (App., *infra*, 53a-54a) are unreported.

JURISDICTION

The court of appeals entered its decision on April 6, 1993, and it denied the United States' petition for rehearing on June 30, 1993. See App., *infra*, 1a, 55a-58a. Through orders signed on September 16, 1993, and October 20, 1993, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including

November 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, provides in relevant part:

> **(a) Removal and other remedial action by President**
> * * *
>
> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment * * *, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance * * *.

42 U.S.C. 9604(a).

Section 113 of CERCLA provides in relevant part:

> **(h) Timing of review**
>
> No Federal court shall have jurisdiction under Federal law * * * to review any challenges to removal or remedial action selected under [Section 104 of CERCLA] in any action except one of the following:
>
> * * * * *
>
> (4) An action under [Section 310 of CERCLA] alleging that the removal or remedial action taken under [Section 104] was in violation of any requirement of this chapter. * * *

42 U.S.C. 9613(h).

Section 120(a) of CERCLA provides in relevant part:

(4) State laws

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned and operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. * * *

42 U.S.C. 9620(a)(4).

Section 122(e)(6) of CERCLA provides:

(6) Inconsistent response action

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. 9622(e)(6).

Other related CERCLA provisions are reproduced in the appendix to this petition. App., *infra*, 117a-149a.

STATEMENT

The United States is currently responding to the release and threatened release of hazardous substances at the Department of the Army's Rocky Mountain Arsenal pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* CERCLA provides extensive opportunities for state involvement in the response process. Respondents State of Colorado and Colorado Department of Health (hereinafter Colorado)

have nevertheless sought to assert direct control over cleanup of the site, independently of CERCLA, by issuing an administrative compliance order dictating response activities under the Colorado Hazardous Waste Management Act (CHWMA), Colo. Rev. Stat. §§ 25-15-301 *et seq.* (1989 & Supp. 1993). The United States District Court for the District of Colorado ruled that CERCLA precludes Colorado from enforcing its compliance order. See App., *infra,* 50a-51a. The court of appeals reversed the district court's judgment and vacated that ruling. *Id.* at 39a-40a.

1. Congress enacted CERCLA in response to committee reports recommending federal legislation to address the dangers posed by abandoned or inactive hazardous waste sites. See, *e.g.,* H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17-22 (1980). Those reports concluded that existing federal laws prospectively regulating hazardous waste disposal, including the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.,* were "clearly inadequate to deal with this massive problem." H.R. Rep. No. 1016, Pt. I, *supra,* at 17-18. Instead, separate legislation was necessary to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with [those] sites." *Id.* at 22. See App., *infra,* 5a-6a.

a. CERCLA's basic statutory framework has remained unchanged since its inception. See Pub. L. No. 96-510, 94 Stat. 2767. Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604. Section 105 directs that the NCP shall include a

National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue orders to compel liable persons to respond to releases or threats of release, 42 U.S.C. 9606, while Section 107 allows the United States to recover its response costs from liable parties, 42 U.S.C. 9607. Section 113 provides for judicial review in the federal courts. 42 U.S.C. 9613. Since its original enactment, CERCLA has also contained two so-called "savings" provisions, Sections 114(a) and 302(d), that preserve the power of States to create additional "liability," "requirements," or "obligations" with respect "to the release of hazardous substances." 42 U.S.C. 9614(a), 9652(d).[1]

b. Congress amended CERCLA in 1986 based on the experience that the United States had gained through implementation of the statute. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. The SARA amendments preserve the United States' primary role in addressing CERCLA sites, but they also require that the United States work in close cooperation with the States to produce prompt, efficient, and thorough CERCLA response actions. The amendments included the following new CERCLA provisions that are relevant to this case:

i. *Section 113(h) and (j).* Section 113(h) and (j) places specific limitations on judicial review of CERCLA response actions. Under those provisions, a federal district court generally lacks jurisdiction to review a chal-

[1] Section 101 of CERCLA defines many of the statute's pertinent terms, including "hazardous substance," "person," "release," "removal," "remedial action," and "response." See 42 U.S.C. 9601.

lenge to the federal government's selection of a response action until after the response action is finally completed, 42 U.S.C. 9613(h)(4); judicial review is limited to the administrative record, 42 U.S.C. 9613(j)(1); and the federal government's selection of a response action shall be upheld unless the objecting party shows that it was arbitrary and capricious or otherwise not in accordance with law, 42 U.S.C. 9613(j)(2).

ii. *Section 120.* Section 120 provides detailed guidance on the application of CERCLA to federal facilities. Section 120(a) basically specifies that CERCLA response mechanisms shall apply to those facilities. 42 U.S.C. 9620(a). Section 120(a)(4) further provides that "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at [federal] facilities * * * when such facilities are not included on the [NPL]." 42 U.S.C. 9620(a)(4). Section 120(c) and (d) then provides procedures guiding the federal government's decision whether to list a federal facility on the NPL. 42 U.S.C. 9620(c) and (d). Once a federal facility is listed on the NPL, it becomes subject to a detailed regime for federal response action, including provisions requiring the development of an interagency agreement (IAG) to govern the remedial action, provisions mandating that the Environmental Protection Agency (EPA) shall have final authority over selection of a remedy, provisions governing timing of the response action, and provisions allowing the States to participate extensively in the selection of a remedy. 42 U.S.C. 9620.[2]

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[2] For example, Section 120(e) requires any federal department, agency or instrumentality that owns or operates a facility on the NPL to enter into an IAG with the EPA to govern "all necessary remedial action" at the site concerned. 42 U.S.C. 9620(e). Section

iii. *Section 121.* Section 121 governs the selection of remedial actions at all CERCLA sites, including federal facilities. Section 121(a) through (c) basically requires the President to select remedial actions that are consistent with the NCP, are cost-effective, are protective of human health and the environment, and provide permanent solutions to the maximum extent practicable, including provisions for future monitoring if hazardous substances remain on the site. 42 U.S.C. 9621(a)-(c). In addition, Section 121(d) provides that the selected remedy, once completed, must achieve the level of cleanup specified pursuant to "applicable" or "relevant and appropriate" requirements (ARARs) under federal or state environmental law. 42 U.S.C. 9621(d). Section 121's so-called "ARARs" process gives the States an extensive role in the development, selection, and enforcement of the CERCLA remedy, see 42 U.S.C. 9621(d) through (f); however, Section 121(e)(1) expressly provides that "[n]o Federal, State, or local permit shall be required" for on-site removal or remedial actions. 42 U.S.C. 9621(e)(1).[3]

120(e)(4)(A) specifies that the EPA has final authority over the selection of any remedial action. 42 U.S.C. 9620(e)(4)(A). Section 120(e)(6) provides that if another party is potentially responsible under CERCLA and the EPA determines that the party will properly undertake remedial investigations and feasibility studies or remedial action, the EPA may enter into an agreement concerning remedial action with such party pursuant to Section 122 of CERCLA (discussed in text *infra*). 42 U.S.C. 9620(e)(6). Section 120(f) guarantees state officials an opportunity to participate in the planning and selection of remedial actions at federally owned NPL sites in accordance with Section 121 of CERCLA (discussed in text *infra*). 42 U.S.C. 9620(f). Section 120(g) prohibits the EPA from delegating its authority under Section 120 to any person outside of EPA. 42 U.S.C. 9620(g).

[3] Section 121(d) employs ARARs to provide a comprehensive mechanism for state input in planning the CERCLA response

iv. *Section 122.* Section 122 describes the President's authority to enter into agreements with private parties to perform CERCLA response actions and contains various provisions designed to encourage settlements. Section 122(e)(6) specifically provides that once the President, or a potentially responsible party acting pursuant to an administrative order or consent decree, has initiated a remedial investigation and feasibility study at a site, no potentially responsible party may take any remedial action at the site unless the President has authorized that action. 42 U.S.C. 9622(e)(6).

c. CERCLA vests most of the federal authority contained therein in the President, who in turn has delegated authority to the Administrator of the EPA and other federal officials, including the Secretary of Defense. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

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action. See 42 U.S.C. 9621(d). In addition, Section 121(e)(2) expressly allows the States to enforce the ARARs once a remedy is selected. See 42 U.S.C. 9621(e)(2). More generally, Section 121(f)(1) directs that the President must allow the States "substantial and meaningful involvement" in remedy development and selection and describes in elaborate detail the States' role. 42 U.S.C. 9621(f)(1). Section 121(f)(2) and (3) additionally provides that if the President waives an ARAR pursuant to Section 121(d)(4), a State may seek judicial review in federal district court challenging that decision. See 42 U.S.C. 9621(d)(4), (f)(2) and (3). Section 121(f)(3) specifically addresses a State's right to judicial review with respect to federal facilities. 42 U.S.C. 9621(f)(3). That provision directs that if the State establishes that the President's decision with respect to the ARAR is not supported by substantial evidence, then the remedy must be modified to conform to the ARAR. But even if the State fails to make that showing and the court upholds the President's remedy selection, the State may still require compliance with the ARAR at issue "if the State pays, within 60 days of judgment, the additional costs attributable to meeting" the ARAR. 42 U.S.C. 9621(f)(3)(B).

The EPA has primary authority for implementing CERCLA, which it exercises in part through the NCP. The EPA has revised the NCP in light of the SARA amendments, and the revised NCP provides extensive guidance on the ARARs process. See 40 C.F.R. Pt. 300; 55 Fed. Reg. 8666 (1990); see also *Ohio* v. *United States EPA*, 997 F.2d 1520 (D.C. Cir. 1993) (rejecting various challenges to the revised NCP). In addition, the EPA has provided guidance on the CERCLA response process through its Listing Policy for Federal Facilities, 54 Fed. Reg. 10,520 (1989).

2. When Congress enacted CERCLA, it had already created a federal permitting scheme, embodied in RCRA, to regulate prospectively the treatment, storage, and disposal of hazardous wastes. See p. 4, *supra*. RCRA was widely recognized at that time as " 'clearly inadequate' to deal with 'the inactive hazardous waste site problem.' " App., *infra*, 5a-6a. RCRA, however, has since been amended and strengthened in significant respects. See Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221. RCRA currently imposes extensive regulatory requirements on owners and operators of hazardous waste facilities, including federal facilities, and those requirements provide a backdrop for the dispute in this case.

a. Section 3005 of RCRA requires that hazardous waste facilities be operated only in accordance with a RCRA-based permit. See 42 U.S.C. 6925; 40 C.F.R. Pt. 270. Recognizing that the EPA could not issue permits to all applicants before the effective date of the relevant portions of RCRA, Congress provided that facilities in existence on November 19, 1980, could obtain "interim status," allowing them to continue operating until final action was taken on their permit applications. 42 U.S.C.

6925(e). Section 3008(h) of RCRA authorizes the EPA to order corrective action where there has been a release of hazardous wastes at facilities operating in interim status. 42 U.S.C. 6928(h).

b. Under the EPA's regulations, a "RCRA permit application consists of two parts," Part A and Part B. 40 C.F.R. 270.1(b). Timely submission of Part A of the permit application qualifies facilities for interim status, and such facilities are then "treated as having been issued [a] permit" until a final permit determination is made. 42 U.S.C. 6925(e); 40 C.F.R. 270.1(b). See *EPA* v. *Environmental Waste Control, Inc.*, 917 F.2d 327, 330 (7th Cir. 1990), cert. denied, 499 U.S. 975 (1991). Facilities must then file a more detailed Part B, and upon successful completion of that process, the facility receives a final permit. 42 U.S.C. 6925(a)-(c); 40 C.F.R. 270.1(b); *Environmental Waste Control, Inc.*, 917 F.2d at 330.

c. A State may petition the EPA for authorization to administer and enforce a state hazardous waste program "in lieu of" the federal RCRA program, provided that the State satisfies certain requirements. See RCRA § 3006, 42 U.S.C. 6926; 40 C.F.R. Pt. 271. Federal agencies generally must comply with the state program requirements "to the same extent" as other persons. RCRA § 6001, 42 U.S.C. 6961. Effective November 2, 1984, EPA authorized Colorado to begin administration of its own hazardous waste management program—namely, the CHWMA, Colo. Rev. Stat. §§ 25-15-301 *et seq.* (1989 & Supp. 1993). See 49 Fed. Reg. 41,036 (1984). Colorado has adopted CHWMA regulations that largely mirror the EPA's RCRA regulations. See Colo. Code Regs. 1007-3 Pts. 261, 264, and 265.

3. The Rocky Mountain Arsenal is a 27-square-mile Department of the Army facility located near Denver,

Colorado. Portions of the site were contaminated by a variety of hazardous substances resulting from Army production of chemical warfare agents during and after World War II and pesticide production by a government lessee, Shell Oil Company, commencing in the 1950s. The Arsenal has spawned a number of different environmental suits. The central question in this case is who has authority to determine the appropriate remedy for the site: the United States pursuant to CERCLA, or the State of Colorado pursuant to the CHWMA. The issue has arisen in the context of the remediation of Basin F, a 92.7-acre lined basin used for disposal of liquid wastes between 1956 and 1982. See App., *infra*, 2a-3a.

a. In November 1980, before enactment of CERCLA, the Army concluded that the Arsenal was subject to RCRA's permitting requirements. The Army submitted Part A of a RCRA permit application to the EPA and thereby achieved interim status for Basin F. The Army subsequently submitted Part B of the permit application, which included a closure plan for Basin F. However, in May 1984, the EPA concluded that the application was deficient and directed the Army to submit a revised Part B application. Before the revised application was completed, the Army began to address the hazards posed by the site through CERCLA. In October 1984, the Army commenced a remedial investigation/feasibility study (RI/FS) pursuant to CERCLA, and in June 1986, the Army announced that it was taking a CERCLA interim response action with respect to Basin F. See App., *infra*, 8a-9a, 10a-11a.

b. Meanwhile, in November 1984, the EPA concluded that Colorado's CHWMA permitting program was consistent with RCRA, and the EPA authorized Colorado to conduct that program "in lieu of" the federal RCRA

permitting program. When Colorado assumed authority over RCRA matters within its borders, the Army provided Colorado with the Part B permit application revised in response to the EPA's notice of deficiency.[4] The Army subsequently informed Colorado that, in the Army's view, initiation of a CERCLA response action precluded Colorado from independently enforcing state hazardous waste law at the Arsenal. Nevertheless, in 1986, Colorado issued a Basin F closure plan and brought suit in state court to enforce certain CHWMA provisions. The Army removed the action to federal district court. In November 1987, Colorado amended its complaint to seek enforcement of the State's closure plan for Basin F. See App., *infra*, 9a-10a.

c. While Colorado's suit was pending in federal district court, the United States moved forward to respond to Basin F—one of the most immediate hazards posed by the Rocky Mountain Arsenal. The EPA, the Army, and Shell Oil Company worked with Colorado to reach an agreement pursuant to CERCLA on an interim response for Basin F. But when the Army requested Colorado to identify ARARs and comment on the Army's proposed plan pursuant to Section 121(d) and (f)(1) of CERCLA (see pp. 7-8 & n.3, *supra*), Colorado did not respond. In January 1988, the Army issued its decision document for the Basin F response, and by December

[4] The court of appeals stated that the Army submitted "the same deficient application that the Army submitted to the EPA." App., *infra*, 9a-10a. That statement is incorrect. The Army explained in an accompanying transmittal letter that the revised application included the original Basin F closure plan as an appendix for purposes of completeness only and that the closure plan was being reevaluated as part of the CERCLA process commenced in October 1984.

1988, the Army had completed much of the interim response. See App., *infra,* 11a-12a.[5]

d. In February 1989, the district court ruled that Colorado could pursue its CHWMA enforcement action against the Army. *Colorado* v. *Department of the Army,* 707 F. Supp. 1562 (D. Colo.). The court relied in part on the fact that Section 120(a)(4) of CERCLA provides that state laws concerning removal and remedial action, "including State laws regarding enforcement," shall apply to response actions at federal facilities "when such facilities are not included on the National Priorities List," 42 U.S.C. 9620(a)(4). See 707 F. Supp. at 1569-1570. See p. 6, *supra.* Although the EPA had listed most of the Rocky Mountain Arsenal on the NPL, see 52 Fed. Reg. 27,620, 27,641 (1987), the EPA had failed to include Basin F because of uncertainty regarding the RCRA status of that unit. The EPA resolved that uncertainty and proposed to add Basin F to the Rocky Mountain Arsenal listing. 52 Fed. Reg. 27,643, 27,646 (1987). This expansion of the Arsenal listing did not become final until March 1989. 54 Fed. Reg. 10,512, 10,515-10,516 & n.2 (1989). At that time, the Army sought reconsideration of the district court's decision. App., *infra,* 12a-13a & n.12, 15a n.15.

e. On September 1, 1989, Colorado issued a 259-paragraph final amended compliance order (FACO). App., *infra,* 59a-116a. The FACO charged that the Army's

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[5] Although the initial phase of the interim action was completed in early 1989, substantial work remains to be done. Liquids removed from the basin are currently being incinerated as the second phase of the interim response. Final disposition of solids removed from the basin, and now stored in a wastepile, and of less contaminated soils left in place, will be determined as part of the final CERCLA record of decision to be issued in late 1994.

response activities at Basin F constituted 42 separate violations of the CHWMA. *Id.* at 64a-104a.[6] The FACO specifically ordered the Army to submit an amended Basin F closure plan—including detailed work, contingency, and inspection plans and schedules—for Colorado's approval. *Id.* at 104a-112a. It also ordered the Army to pay various fees, submit a revised permit application, provide additional site information, and build an emergency containment structure. *Id.* at 112a-115a. The FACO expressly directed that the Army "shall not implement any work plan, closure plan, or post-closure plan prior to approval by [Colorado]." *Id.* at 109a.[7]

f. The focus of the dispute between the United States and Colorado returned to federal district court. The United States sought a declaration from the district court that CERCLA precludes Colorado from directing the Army's Basin F response activities, while Colorado requested the court to enforce the FACO. The district court ruled that Colorado lacked authority to dictate

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[6] Those violations included alleged failures to: comply with or seek amendment of Colorado's Basin F closure plan, App., *infra*, 64a-67a (violations 1-3); obtain interim status or state permits for response actions, *id.* at 67a-73a (violations 4-9); pay associated fees, *id.* at 73a-75a (violations 10-12); respond to a tank release, *id.* at 75a-77a (violations 13-15); provide access to records, *id.* at 78a-81a (violation 16); perform adequate inspections, *id.* at 82a-93a (violations 17-34); provide notification of leaks, *id.* at 93a-98a (violations 35-37); remedy liners, *id.* at 98a-99a (violations 38-39); prepare and distribute a contingency plan, *id.* at 99a-102a (violations 40-41); and maintain adequate operating records, *id.* at 102a-104a (violation 42).

[7] The FACO further noted that the Army would be subject to civil penalties of as much as $25,000 per day for each violation of the CHWMA or the FACO. App., *infra*, 115a.

response actions at Basin F and it enjoined Colorado from enforcing the FACO. App., *infra*, 41a-52a. The court reasoned that Section 113(h) of CERCLA, which restricts federal court review of CERCLA remedial action prior to completion, "unambiguously indicates that this court lacks jurisdiction for pre-completion review of the remedial action presently underway at Basin F now that it has been placed on the NPL." App., *infra*, 48a-49a. The court explained that "[a]ny attempt by Colorado to enforce the CHWMA would require this court to review the remedial actions selected under [CERCLA] prior to their completion." *Id.* at 50a. See *id.* at 14a-16a.[8]

g. The court of appeals reversed the district court's ruling. App., *infra*, 1a-40a. The court of appeals first held that Section 113(h) of CERCLA is inapplicable because Colorado's attempt to enforce the FACO "is not a 'challenge' to the Army's CERCLA response action." App., *infra*, 19a. The court next stated that Section 120(a)(4) of CERCLA, which addresses the application of state law to federal facilities, is inapplicable, reasoning that the CHWMA is not "a state law 'concerning removal and remedial action.' " App., *infra*, 30a. The court of appeals acknowledged that Section 121 of CERCLA gives the States an extensive role in the selection of the CERCLA remedy, App., *infra*, 32a, that Section 121(e)(1) of CERCLA expressly prohibits States from imposing permit requirements on CERCLA response actions, App., *infra*, 35a, and that Section 122 of CERCLA prohibits unauthorized response actions at CERCLA sites, App., *infra*, 36a. The court nevertheless

[8] The district court also dismissed Colorado's previous enforcement action against the Army, see App., *infra*, 15a n.15, and entered a final judgment prohibiting Colorado from enforcing the FACO, *id.* at 53a-54a.

concluded that CERCLA's so-called savings provisions, Sections 114(a) and 302(d), allow Colorado to by-pass those provisions and dictate hazardous substance response actions at Basin F directly pursuant to state law. App., *infra*, 31a-40a.

REASONS FOR GRANTING THE PETITION

CERCLA creates a comprehensive federal mechanism for responding to releases of hazardous substances, including releases from federal facilities, and it creates an elaborate process for federal-state cooperation in the selection of appropriate response actions. The court of appeals' decision in this case holds that the CERCLA process is merely optional and that a State may directly control federal response activities at a CERCLA site by issuing compliance orders pursuant to state law. This Court should review that decision, because it presents a disagreement between the United States and a State on an important federal question, because it conflicts with decisions of other courts of appeals, and because it is incorrect.

1. Congress amended CERCLA to ensure that the United States could act promptly—and without litigation delays—in responding to the release and threatened release of hazardous substances. See CERCLA § 113(h) and (j), 42 U.S.C. 9613(h) and (j). But Congress also included detailed provisions in CERCLA specifying the role of the States in selecting appropriate response actions for federal and non-federal facilities. See CERCLA §§ 120-121, 42 U.S.C. 9620-9621. CERCLA provides a specific process—including the IAG and ARARs mechanisms—by which federal and state governments are to choose and implement responses cooperatively. CERCLA § 121(d)-(f), 42 U.S.C. 9621(d)-(f).

The United States and the State of Colorado disagree on the significance of CERCLA's detailed response process. In the United States' view, once a federal facility is listed on the NPL, that process provides the controlling mechanism for state involvement in the cleanup. In Colorado's view, the CERCLA process is simply an optional avenue for the State, which may bypass the process and independently impose its state laws directly on the site. This disagreement raises a question of nationwide importance. Indeed, 22 States appeared as amicus curiae in the court of appeals supporting Colorado's view that the States can proceed independently of the CERCLA process to take response actions at the site.

The dispute between the United States and Colorado is important for reasons beyond its inter-sovereign character. The question posed here is one of immense practical importance. The selection of a CERCLA remedy is an extraordinarily complex task. In determining the appropriate response, the CERCLA decision-maker must consider countless variables related to the character of the site, its surrounding environment, the substances that are present, and the current state of remedial technology. Based on those considerations, the CERCLA decision-maker must settle on a remedy that resolves numerous subsidiary issues, including whether to remove the hazardous substances from the facility or to contain or destroy them on-site; how to engineer the removal, containment or destruction; and what further monitoring, inspection, and limitations on future use are appropriate. If a State may simply sit out this decision-making process and then collaterally attack the CERCLA response action through a state compliance order, the result will be chaotic.

The problem is well illustrated by this case. The Rocky Mountain Arsenal is "one of the worst hazardous waste

pollution sites in the country." App., *infra*, 3a. Under the most conservative estimates, the total cost for cleaning up the Arsenal will exceed $1,700,000,000. Indeed, it may cost some multiple of that amount. The United States has undertaken an interim response at Basin F, which represents only one small portion of the Arsenal. But it has been impeded by Colorado's refusal to channel its input through CERCLA's ARARs process. The court of appeals' decision, which effectively holds that Colorado can bypass that process and then attack the Basin F interim response through state compliance orders, will result in further wasteful litigation and delay.

2. The court of appeals' decision in this case not only raises an important question of federal law; it also conflicts with decisions rendered by other courts of appeals. As a threshold matter, the court of appeals' interpretation of Section 113(h), which governs the manner and timing of judicial review of CERCLA response actions, is at odds with *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011 (3d Cir. 1991), and *Schalk* v. *Reilly*, 900 F.2d 1091 (7th Cir.), cert. denied, 498 U.S. 981 (1990). See discussion at p. 21, *infra*. But the conflict of greatest practical significance is with the Sixth Circuit's decision in *United States* v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409 (1991).

In *Akzo*, the United States and potentially responsible private parties reached agreement on the cleanup of the Rose Site in Oakland County, Michigan, and filed a proposed consent decree in federal district court. The State of Michigan filed a complaint in intervention objecting to entry of the consent decree and, in addition, requesting additional relief at the site under state law. See 719 F. Supp. 571 (E.D. Mich. 1989). The State specifically relied on the Michigan Water Resources Commission Act, Mich. Comp. Laws Ann. § 323.6 (West

1992), the Michigan Environmental Protection Act, Mich. Comp. Laws Ann. § 691.1201 *et seq.* (West 1992), and the common law of public nuisance, contending that

> the requirements for state participation in the EPA remedy selection process are supplementary to, not a substitute for, the State's continued right to enforce its environmental standards.

719 F. Supp. at 579. The district court rejected that argument, concluding that "Congress intended CERCLA to preempt state claims to the extent that they are in conflict with the federal statute" and that Michigan could participate in the remedy selection through the ARAR process, but it could not impose its own requirements upon the private parties "in addition to the EPA's settlement." *Id.* at 580. The Sixth Circuit agreed. That court "eschew[ed] use of the word preemption in this context"—because CERCLA preserves and applies state environmental standards through its comprehensive response process—but the court nevertheless concluded that CERCLA precludes imposition of "independent state remedies" once a CERCLA action is underway. 949 F.2d at 1458.

The *Akzo* decision conflicts with the court of appeals' decision in this case, which squarely rejects the United States' submission that CERCLA "bars Colorado from enforcing state law independent of CERCLA." App., *infra,* 31a. The court of appeals attempted to distinguish *Akzo* on the ground that

> [u]nlike the state in *Akzo Coatings,* Colorado is asserting its independent EPA-delegated RCRA authority rather than challenging the selection of a CERCLA remedy.

Id. at 34a n.21. The court is mistaken, however, in its characterization of that case. As the lower court's deci-

sion in *Akzo* makes clear, Michigan claimed that it was asserting independent state law in addition to challenging the remedy selection. See 949 F.2d at 1458; 719 F. Supp. at 579. Furthermore, under the decision below, it is immaterial whether Colorado is asserting "EPA-delegated RCRA authority" or some other form of state environmental law. The court of appeals based its decision on CERCLA's savings provisions, Sections 114(a) and 302(d), which make no distinction between "EPA-delegated RCRA authority" and other state law. 42 U.S.C. 9614(a) and 9652(d). See App., *infra*, 31a.[9]

3. The court of appeals' decision warrants review for the additional reason that it is erroneous. The question whether Colorado can enforce its compliance order at Rocky Mountain Arsenal turns on three subsidiary issues: (a) the courts' jurisdiction to review CERCLA response actions; (b) the State's role in selecting a CERCLA remedy; and (c) the State's power to dictate unauthorized activities at a CERCLA site. CERCLA addresses each of those issues, and in each instance it poses a bar to Colorado's action.

a. At the threshold, CERCLA imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA response actions. Section 113(h) expressly provides that no federal court shall have jurisdiction to review "any challenges to removal or remedial action" selected under CERCLA except

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[9] Indeed, *Akzo* highlights how state assertions of independent state law would not only disrupt federal cleanup efforts, but would additionally disrupt settlements with private responsible parties in contravention of the policy, reflected in Section 122 of CERCLA, of encouraging the parties that created the hazardous conditions to take responsibility for the site conditions and to complete expeditious cleanups themselves. See 42 U.S.C. 9622.

through five specific avenues, none of which is applicable here. 42 U.S.C. 9613(h).[10] Thus, Section 113(h) bars Colorado's attempt to enforce the FACO if Colorado's request for relief is a "challenge" to the United States' CERCLA response action at Basin F. Colorado's attempt to enforce the FACO is such a "challenge," because the FACO would expressly prohibit the response action from proceeding. See, *e.g.*, App., *infra*, 109a (directing that the Army "shall not implement any work plan, closure plan, or post-closure plan" without Colorado's approval).

The court of appeals concluded otherwise, stating that Colorado's FACO

> does not seek to halt the Army's Basin F interim response action; rather it merely seeks the Army's compliance with CHWMA during the course of the action, which includes [Colorado's] approval of the Basin F closure plan prior to implementation.

App., *infra*, 21a. That purported distinction, however, is mere word play. Colorado seeks to prevent the United States from implementing its CERCLA response action until Colorado approves it, and that amounts to a "challenge" to the response action under Section 113(h). See *Boarhead*, 923 F.2d at 1013-1014 (holding that Section 113(h) prohibits a suit under the National Historic Preservation Act of 1966 to enjoin a CERCLA response action); *Schalk* v. *Reilly*, 900 F.2d at 1097 (holding that Section 113(h) prohibits a suit under the National Environmental Policy Act that would "impact the implementation" of a CERCLA remedy).

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[10] The most nearly applicable avenue, set forth in Section 113(h)(4), allows an action under CERCLA's citizen suit provision, Section 310, once the response action has been completed. 42 U.S.C. 9613(h)(4). Colorado, however, has not brought a citizen suit and the response action has not been completed.

b. The court of appeals' misunderstanding of Section 113(h) leads directly to our second and more fundamental point. CERCLA does not simply restrict the power of federal courts as to the manner or timing of judicial challenges; it also provides the States with a full opportunity to participate in the remedy selection process. CERCLA contains detailed provisions that give the States a direct voice in the selection of CERCLA response actions—including federal facility response actions—and that provide a framework to resolve issues that would otherwise result in protracted litigation. Thus, if Colorado seeks "compliance with [the] CHWMA," App., *infra*, 21a, it need only participate in CERCLA's response process.

As its name indicates, CERCLA creates a *comprehensive* scheme for responding to releases of hazardous substances. See pp. 4-9, *supra*. The statute spells out in painstaking detail the respective roles of the United States and the States in developing response actions at federal and non-federal facilities. In the case of federal facilities such as the Rocky Mountain Arsenal, Section 120 provides (among other things) that:

- Federal agencies are subject to CERCLA's substantive and procedural requirements (CERCLA § 120(a));
- The EPA shall determine within a specified time period whether federal facilities warrant inclusion on the NPL (CERCLA § 120(c)-(d));
- Once a federal facility is placed on the NPL, the federal agency responsible for the facility must develop and implement an EPA-approved response action within time frames set by CERCLA and EPA (CERCLA § 120(e)); and
- State and local officials are entitled to participate in the planning and selection of the federal remedial

action in accordance with CERCLA's Section 121 (CERCLA § 120(f)).

See 42 U.S.C. 9620. Thus, once the EPA elects to place a federal facility on the NPL, the State has a direct role in the remedy selection process through Section 121, which specifies that:

- The EPA must promulgate regulations providing for "substantial and meaningful" state involvement in the remedy selection process (CERCLA § 121(f));
- The selected remedy must satisfy all "applicable" or otherwise "relevant and appropriate" requirements (ARARs) under federal *and* state law—such as the substantive requirements of Colorado's CHWMA—unless the EPA waives an ARAR requirement based on one of several specified grounds (CERCLA § 121(d));
- If the EPA waives an ARAR, then the State may bring a judicial action challenging the EPA's decision, and even if the court agrees with the EPA's decision, the State may nonetheless insist on compliance with the ARAR if the State pays the costs associated with satisfying the ARAR (CERCLA § 121(f)(3)).

See 42 U.S.C. 9621; see also 40 C.F.R. Pt. 300. Thus, CERCLA expressly addresses the State's role in determining the CERCLA response. CERCLA provides that once the EPA places a federal facility on the NPL, the States directly participate in the selection and implementation of federal response actions. But if the EPA has not placed a federal facility on the NPL, then "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply." 42 U.S.C. 9620(a)(4).

In this instance, the EPA has placed Basin F on the NPL and the Army has undertaken CERCLA response actions. Thus, if Colorado wishes to obtain "compliance with CHWMA during the course of the action" (App., *infra,* 21a), it must participate in CERCLA's response process rather than attempt to impose "independent state remedies" that are inconsistent with the CERCLA remedy. See *Akzo,* 949 F.2d at 1458. Significantly, Section 121(e)(1) expressly prohibits Colorado from subjecting the CERCLA response action to permitting requirements such as the ones contained in Colorado's FACO. Compare 42 U.S.C. 9621(e)(1) with App., *infra,* 67a, 69a, 72a, 113a.

The court of appeals mistakenly reached a contrary conclusion on the basis of CERCLA's savings provisions, Section 114(a) and Section 302(d), which provide:

> Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. 9614(a).

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. 9652(d).

The court's error arose from its failure to read those provisions in context. To be sure, CERCLA does not disable the States from imposing "liabilities," "require-

ments," and "obligations" respecting the "release of hazardous substances," but where a CERCLA response action is ongoing, CERCLA does require that the applicable state laws shall be incorporated into the CERCLA response action through CERCLA's remedy selection process set forth in Sections 120 and 121. See *Akzo*, 949 F.2d at 1458. Simply put, CERCLA's savings provisions do not allow a State to bypass CERCLA's comprehensive statutory process for assimilating state law. Indeed, if a State could simply bypass the ARARs process and unilaterally impose state law requirements through state compliance orders, the ARARs process would become a dead letter.

c. The existence of CERCLA's comprehensive response process brings us to our third point. CERCLA leaves no doubt that this process is the exclusive means by which a State may direct the selection of a CERCLA remedy, because CERCLA prohibits any person—including a State—from dictating unauthorized response activities at a CERCLA site. Section 122(e)(6) states:

> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. 9622(e)(6). Under that provision, once the CERCLA remedy selection process has led to the initiation of a remedial investigation and feasibility study, a potentially responsible party must obtain the EPA's approval before undertaking any remedial action. Thus, once the process has reached that stage, the State may not unilaterally compel a potentially responsible party

(including, in this case, the Army) to take remedial action.

The court of appeals rejected the comon sense import of Section 122(e)(6), concluding that it was inconsistent with CERCLA's savings clauses. See App., *infra*, 37a. Of course, the court of appeals' duty was to reconcile these statutory provisions, rather than to interpret them as conflicting. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). In any event, the court of appeals is mistaken. As the EPA has explained in its Listing Policy for Federal Facilities,

> CERCLA section 122(e)(6) does not constitute a prohibition on RCRA correction action at CERCLA sites; rather, it provides a mechanism by which the Agency must approve of remedial actions commenced at sites after an RI/FS has been initiated under CERCLA. * * * The Agency * * * intends to authorize many State RCRA actions to continue, e.g., where the RCRA action addresses a unit distinct from the CERCLA contamination, and where the RCRA action will not disrupt CERCLA activities.
>
> * * * * *
>
> Even where EPA decides that it is not appropriate to authorize a RCRA or other State action to continue under CERCLA section 122(e)(6) in order to avoid disruption or duplicative actions, CERCLA section 120(f) specifically provides that participation by State officials in remedy selection "shall be provided in accordance with section 121," and CERCLA section 121(d) specifically provides a process for taking account of "applicable or relevant and appropriate requirements" (ARARs) of RCRA (as well as other State and Federal statutes) when a remedy is selected.

54 Fed. Reg. 10,520, 10,523 (1989).

Thus, the court once again misconceived the significance of CERCLA's substantive provisions governing response actions. That error, like the others, warrants correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 91-1360

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF COLORADO AND COLORADO DEPARTMENT OF HEALTH, DEFENDANTS-APPELLANTS

STATE OF ALASKA, STATE OF ARKANSAS, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF INDIANA, STATE OF IOWA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OHIO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF TENNESSEE, STATE OF UTAH, AND STATE OF WYOMING, AMICI CURIAE

April 6, 1993
Rehearing Denied June 30, 1993

Before BALDOCK and HOLLOWAY, Circuit Judges, and EARL E. O'CONNOR, Senior District Judge.*

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* The Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

BALDOCK, Circuit Judge:

This case examines the relationship between the Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub.L. No. 94-580, 90 Stat. 2795, as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub.L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6981 (West 1983 & Supp. 1992)), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (Codified as amended at 42 U.S.C. §§9601-9675 (West 1983 & Supp. 1992) and 26 U.S.C. § 9507 (West Supp. 1992)). At issue is whether a state which has been authorized by the Environmental Protection Agency ("EPA") to "carry out" the state's hazardous waste program "in lieu of" RCRA, *see* 42 U.S.C. § 6926(b) (West Supp. 1992), is precluded from doing so at a hazardous waste treatment, storage and disposal facility owned and operated by the federal government which the EPA has placed on the national priority list, *see id.* § 9305(a))8)(B), and where a CERCLA response action is underway. *See* 42 U.S.C. § 9604 (West 1983 & Supp.1992).

I.

The Rocky Mountain Arsenal ("Arsenal") is a hazardous waste treatment, storage and disposal facility subject to RCRA regulation, *see* 42 U.S.C. § 6924(a) (West Supp.1992), which is located near Commerce City, Colorado in the Denver metropolitan area. The United States government has owned the Arsenal

since 1942, and the Army operated it from that time until the mid-1980's. Without reiterating its environmental history, suffice it to say that the Arsenal is "one of the worst hazardous waste pollution sites in the country." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1531 (10th Cir.1992) (footnote omitted). The present litigation focuses on Basin F which is a 92.7 acre basin located within the Arsenal where millions of gallons of liquid hazardous waste have been disposed of over the years.

A.

Congress enacted RCRA in 1976 "to assist the cities, counties and states in the solution of the discarded materials problems and to provide nationwide protection against the dangers of improper hazardous waste disposal." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249. RCRA requires the EPA to establish performance standards, applicable to owners and operators of hazardous waste treatment, storage and disposal facilities "as may be necessary to protect human health and the environment."[1] 42 U.S.C. § 6924(a) (West Supp.1992). The EPA enforces RCRA standards by requiring owners and operators of facilities

[1] Among the standards promulgated by the EPA are specific requirements governing the closure of hazardous waste treatment, storage and disposal facilities. *See* 40 C.F.R. § 264-228 (1992) (closure and post-closure care); *id.* § 265.228 (closure and post-closure care for interim status facilities). *See also* Donald W. Stever, *Law of Chemical Regulation and Hazardous Wastes*, § 5.06[2][d][iii][A], at 5-65 (1991).

to obtain permits,[2] *see* 42 U.S.C. § 6925 (West 1983 & Supp.1992), and by issuing administrative compliance orders and seeking civil and criminal penalties for violations. *Id.* § 6928. The EPA may authorize states to "carry out" their own hazardous waste programs "in lieu of" RCRA and to "issue and enforce permits for the storage, treatment, or disposal of hazardous waste" so long as the state program meets the minimum federal standards.[3] 42 U.S.C. § 6926(b) (West Supp.1992). *See also* H.R. Rep. No. 1491(I) at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6270 (under RCRA, states retain "primary authority" to implement hazardous waste programs). However, RCRA does not preclude a state from adopting more stringent requirements for the treatment, storage and disposal of hazardous waste. 42 U.S.C. § 6929 (West Supp.1992). *See also Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Protection,* 965 F.2d 1287, 1296 (3d Cir.) ("RCRA sets a floor not a ceiling for state regulation of hazardous wastes"), *cert. denied,* __ U.S. ___, 113 S.Ct. 602, 121 L.Ed.2d 538 (1992). Once the EPA authorizes a state to carry out the state hazardous waste program in lieu of RCRA, "[a]ny action taken by [the] State [has] the same force and effect as action taken by the [EPA]...." 42 U.S.C. §

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[2] Pending permit approval, RCRA permitted preexisting hazardous waste treatment, storage and disposal facilities to continue operating during the permit application process under "interim status." 42 U.S.C. § 6925(e)(1) (West Supp. 1992).

[3] Congress encouraged states to develop their own hazardous waste programs by directing the EPA to "promulgate guidelines to assist States in the development of [such] programs." 42 U.S.C. § 6926(a) (West 1983).

6926(d) (West 1983). The federal government must comply with RCRA or an EPA-authorized state program "to the same extend as any person...."[4] 42 U.S.C. § 6961 (West 1983). In short, RCRA provides "a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society."[5] H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. *See also Old Bridge,* 965 F.2d at 1292 (RCRA is "principal federal statute regulating the generation, transportation, and disposal of hazardous wastes").

B.

Because RCRA only applied prospectively, it was "clearly inadequate" to deal with " 'the inactive haz-

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[4] In *United States Dep't of Energy v. Ohio,* __ U.S. ___, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992), the Supreme Court held that federal agencies retained sovereign immunity from state civil penalties imposed under RCRA. *Id.* at ___ _ ___, 112 S.Ct. at 1639-40. *See also Mitzelfelt v. Department of Air Force,* 903 F.2d 1293, 1296 (10th Cir. 1990). However, Congress recently amended § 6961 to clearly provide that federal agencies are not immune from such penalties. *See* Federal Facility Compliance Act of 1992, Pub.L. No. 102-386, § 102, 106 Stat. 1505.

[5] In 1984, Congress amended RCRA with the enactment of HSWA which sought to close "various loopholes" that were allowing millions of tons of hazardous waste to escape RCRA's control. *See* H.R. Rep. No. 198(I), 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5578. Congress was concerned that RCRA was not being "conducted in a manner that controls and prevents present and potential endangerment to public health and the environment" and enacted HSWA to prevent "future burdens on the 'Superfund' program...." *id.* at 20, *reprinted in* 1984 U.S.C.C.A.N. at 5579.

ardous waste site problem.' " H.R. Rep. No. 1016(I), at 17-18, *reprinted in* 1980 U.S.C.C.A.N. at 6120. Consequently, Congress enacted CERCLA in 1980 "to initiate and establish a comprehensive reponse and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." *Id.* at 22, *reprinted in* 1980 U.S.C.C.A.N. at 6125. Among its provisions, CERCLA required the President to revise the "national contingency plan for the removal of . . . hazardous substances" which would "establish procedures and standards for responding to releases of hazardous substances...." 42 U.S.C. § 9605(a) (West Supp. 1992). *See also* 40 C.F.R. pt. 300 (1992). When "any hazardous substance is released or there is a substantial threat of such a release into the environment," CERCLA authorizes the President to

> act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a)(1) (West Supp.1992). CERCLA finances these government response actions through the Hazardous Substance Superfund, *see id.* § 961(a)(1); 26 U.S.C. § 9507 (West Supp.1992), and permits the government to seek reimbursement from responsible parties by holding them strictly liable. *Id.* § 9607(a). *See also* H.R.Rep. No. 1016, at 17, 1980 U.S.C.C.A.N. at 6120 (CERCLA establishes "a Federal cause of action in strict liability to enable [the

EPA] to pursue rapid recovery of the costs . . . of [reponse] actions"). *See, e.g., United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir.1992). CERCLA also requires the President to develop a national priority list, as part of the national contingency plan, which identifies "priorities among releases or threatened releases throughout the United States" for government response actions, *id.* § 9605(a)(8). *See* 40 C.F.R. pt. 300 App. B (1992), and the listing of a particular site on the national priority list is a prerequiste to a Superfund-financed remedial action at the site. 40 C.F.R. § 300.425(b)(1) (1992). We note that Superfund monies cannot be used for remedial actions at federal facilities, 42 U.S.C. § 9611(e)(3) (West Supp.1992), but CERCLA otherwise applies to the federal government "to the same extent, both procedurally and substantively, as any nongovernmental entity." *Id.* § 9620(a)(1). In short, CERCLA is a remedial statute "designed to facilitate cleanup of environmental contamination caused by releases of hazardous substances."[6] *Colorado v. Idorado Mining Co.*, 916 F.2d 1486, 1488, 1492 (10th Cir.1990), *cert. denied*, __ U.S. ___, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991). *See also Daigle*, 972 F.2d at 1533.

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[6] Congress amended CERCLA in 1986 by enacting SARA after realizing that CERCLA was "inadequate" to address the environmental threat presented by abandoned hazardous waste sites. *See* H.R.Rep. No. 253, 99th Cong., 2d Sess. 54-55 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836-37. SARA "buil[t] on existing law and significantly strengthen[ed] [CERCLA] in all respects . . . [as well as] provid[ing] the EPA with appropriate flexibility and discretion in order to respond appropriately to each site...." *Id.* at 56, *reprinted in* 1986 U.S.C.C.A.N. at 2838.

II.

In November 1980, the Army, as the operator of the Arsenal, submitted to the EPA part A of its RCRA permit application[7] which listed Basin F as a hazardous waste surface impoundment.[8] Appellants' App. at 413. By submitting the part A RCRA application, the Army achieved RCRA interim status. *See supra* note 2. In May 1983, the Army submitted part B of its RCRA permit application to the EPA which included a required closure plan for Basin F, Appellants' App. at 505, and the following month, the Army submitted a revised closure plan for Basin F. Appellants' App. at 471. *See also supra* notes 1 and 7. In May 1984, the EPA issued a notice of deficiency to the Army regarding part B of its RCRA permit application and requested a revised part B application within sixty

[7] Obtaining a RCRA permit is a two-step process. Part A of the permit application requires general information concerning the facility, the operator, the hazardous wastes and the processes for treatment, storage and disposal. *See* 40 C.F.R. § 270.13 (1992). Part B of the permit application requires more detailed information including a specific closure plan. *See id.* § 270.14.

[8] As a hazardous waste surface impoundment, Basin F is subject to specific RCRA regulations. *See* 40 C.F.R. §§ 265.220-265.230 (1992) (interim status standards for surface impoundments). Further, under HSWA, an interim status surface impoundment cannot receive, store, or treat hazardous waste after November 8, 1988, unless (1) it is in compliance with § 6924(*o*)(1)(A) which requires the "installation of two or more liners," a "leachate collection system," and "groundwater monitoring," or (2) it has at least one liner and there is no evidence that it is leaking, is located more than a quarter mile from an underground source of drinking water, and is in compliance with the groundwater requirements applicable to RCRA permitted facilities. *See* 42 U.S.C. § 6925(j) (West Supp. 1992). *See also id.* § 6924(*o*)(1).

days under threat of termination of the Army's interim status. Appellants' Br. Attach. 12. The Army never submitted a revised part B RCRA permit application to the EPA; rather, in October 1984, the Army commenced a CERCLA remedial investigation/feasibility study ("RI/FS").[9] Appellee's App. at 9, 30.

Effective November 2, 1984, the EPA, acting pursuant to 42 U.S.C. § 6926(b) (West Supp. 1992), authorized Colorado to "carry out" the Colorado Hazardous Waste Management Act ("CHWMA"), Colo.Rev. Stat. §§ 25-15-301 to 25-15-316 (1989 & Supp.1992), "in lieu of" RCRA. *See* 49 Fed.Reg. 41,036 (1984). That same month, the Army submitted its part B RCRA/CHWMA permit application to the Colorado Department of Health ("CDH") which is charged with the administration and enforcement of CHWMA. Appellants' App. at 473. Notably, the part B applica-

[9] While most of the President's CERCLA authority has been delegated to the EPA pursuant to 42 U.S.C. § 9615 (West 1983), the President delegated his CERCLA response action authority under § 9604(a-b) with respect to Department of Defense facilities to the Secretary of Defense. *See* Exec. Order No. 12,316, 46 Fed.Reg. 42,237 (1981), *as amended by* Exec. Order No. 12,418, 48 Fed.Reg. 20,891 (1983), *revoked by and current delegation of authority at* Exec. Order No. 12,580, 52 Fed.Reg. 2,923 (1987). A RI/FS is the first step in a CERCLA remedial action in order "to assess site conditions and evaluate alternatives to the extent necessary to select a remedy." 40 C.F.R. § 300.430(a)(2) (1992). Interestingly, the Army initiated the RI/FS during the month preceding HSWA's effective date, which provided that RCRA interim status surface impoundments undertake corrective action in order to continue treating, storing and disposing of hazardous waste after November 1988. *See supra* note 8. The Army has since maintained that its CERCLA response action precludes Colorado from enforcing its EPA-delegated RCRA authority at the Arsenal.

tion was the same deficient application that the Army submitted to the EPA in June 1983. *Id.* Not surprisingly, CDH found the application, specifically the closure plan for Basin F, to be unsatisfactory. *Id.*

Consequently, in May 1986, CDH issued its own draft partial closure plan for Basin F to the Army, *id.* at 481, and in October 1986, CDH issued a final RCRA/CHWMA modified closure plan for Basin F and requested the Army's cooperation in immediately implementing the plan. *Id.* at 393. The Army responded by questioning CDH's jurisdiction over the Basin F cleanup. *Id.* at 395-96.

In response to the Army's indication that it would not implement CDH's closure plan for Basin F, Colorado filed suit in state court in November 1986. Colorado sought injunctive relief to halt the Army's alleged present and future violations of CHWMA and to enforce CDH's closure plan for Basin F. The Army removed the action to federal district court, and moved to dismiss Colorado's CHWMA enforcement action claiming that "CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal." *Colorado v. United States Dept. of the Army,* 707 F.Supp. 1562, 1565 (D.Colo.1989).

In June 1986, the Army announced that it was taking a CERCLA interim response action with respect to Basin F. Appellee's App. at 20. In September 1986, the Army agreed with Shell Chemical Company[10] on an interim response action in which Shell

[10] From 1946 to 1982, Shell leased a portion of the Arsenal from the Army and disposed of hazardous wastes in Basin F.

would construct storage tanks with a total capacity of four million gallons to hold Basin F liquids. *Id.* In June 1987, the Army, the EPA, Shell and Colorado agreed on a Basin F interim response action which required the Army to remove contaminated liquids to the temporary storage tanks and contaminated sludges and soils to a temporary holding area until determination of a final Arsenal-wide remedy. *Id.* at 47-50. In August 1987, the Army requested that Colorado identify potential applicable or relevant and appropriate requirements ("ARAR's"), *see* 42 U.S.C. § 9621(d) (West Supp.1992); *infra* note 20, for the Basin F interim response action, and, in October 1987, the Army requested comment on its plan, *see* 42 U.S.C. § 9621(f)(1)(E) (West Supp.1992); however, Colorado did not respond to either of these requests. Appellee's App. at 21-22.

In October 1987, the Army advised Colorado that it was withdrawing its still pending part B RCRA/CHWMA permit application claiming that it was ceasing operations of all structures addressed in the application and that it intended to remediate Basin F pursuant to CERCLA. Appellants' App. at 398-400. The Army indicated that it would, however, comply with RCRA and CHWMA in accordance with CERCLA's provisions at 42 U.S.C. § 9620(i) and § 9621(d)(2)(A)(i). *Id.* at 399.

In December 1987, the Army transmitted a draft decision document for the Basin F interim response action to the EPA, Shell and Colorado and initiated a thirty day public comment period, *see* 42 U.S.C. § 9617 (West Supp.1992). Appellee's App. at 22. In January 1988, the Army issued its decision document for the Basin F interim response action. Appellants' App. at

5. Thereafter, the Army began the Basin F interim response action, and, in December 1988, completed the removal of eight million gallons of hazardous liquid wastes from Basin F, relocating four million gallons to three lined storage tanks and four million gallons to a double-lined holding pond. Appellee's App. at 12. In addition, the Army removed 500,000 cubic yards of contaminated solid material from Basin F, dried it, and placed it in a sixteen acre, double lined, capped wastepile. *Id.* The Army also capped the Basin F floor.[11] *Id.*

In February 1989, the federal district court denied the Army's motion to dismiss Colorado's CHWMA enforcement action. The district court relied on several provisions of both RCRA and CERCLA, including CERCLA's provision for the application of state laws concerning removal and remedial action at federal facilities not listed on the national priority list.[12] *Colorado v. United States Dep't of the Army,* 707

[11] The Basin F interim response action led several nearby residents to sue for damages allegedly caused by the release of airborne pollutants. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1532 (10th Cir.1992). The Basin F interim response action also calls for the Army to incinerate the removed liquids. This has yet to be done. Final disposition of the solids remaining under the Basin F cap and in the wastepile will be determined as part of the remedial action for which a final record of decision will be issued in 1994.

[12] Additionally, the district court relied on RCRA's provision regarding its application to federal facilities, 707 F.Supp. at 1565 (citing 42 U.S.C. § 6961), and its citizen suit provision, *Id.* at 1565-66 (citing 42 U.S.C. § 6972). The district court also relied on CERCLA's provisions permitting a state to impose additional requirements on the release of hazardous waste and preserving all other obligations or liabilities of persons under other federal or state law, *id.* at 1569 (citing 42 U.S.C. §§ 9614(a),

F.Supp. at 1569-70 (citing 42 U.S.C. § 9620(a)(4)). The district court found this provision to be particularly noteworthy in light of the fact that Basin F was not listed on the national priority list. *Id.* Furthermore, the district court expressed particular concern about the relationship between the Army and the EPA, noting that the EPA's "potential monitoring of the Army's Basin F cleanup operation under CERCLA does not serve as an appropriate or effective check on the Army's efforts,"[13] and that Colorado's involvement "would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup." *Id.* at 1570. Thus, the district court held that Colorado was not precluded from enforcing CHWMA, pursuant to its EPA-delegated RCRA authority, despite the Army's cleanup efforts under CERCLA. *Id.*

In March 1989, the month following the district court's order, the EPA added Basin F to the national priority list.[14] 54 Fed.Reg. 10,512 (1989). The Army

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9652(d)), and CERCLA's provisions concerning federal facilities which indicated to the district court that CERCLA did not affect or impair the obligation of a federal facility to comply with RCRA. *Id.* (citing 42 U.S.C. §§ 9620(a)(1), 9620(a)(4), 9620(i)).

[13] The district court noted that the Army, as a responsible party, has an "obvious financial interest to spend as little money and effort as possible on the cleanup," whereas the EPA has the responsibility "to achieve a clean up as quickly and thoroughly as possible. . . ." 707 F.Supp. at 1570. The district court also noted that the same Justice Department attorneys were representing both the Army and the EPA despite the court's expressed concern over a conflict. *Id.*

[14] Although the EPA had listed the Arsenal on the national priority list in July 1987, 52 Fed.Reg. 27,620, 27,641 (1987),

immediately moved for reconsideration of the district court's order in light of the EPA's listing of Basin F on the national priority list.

In September 1989, CDH, acting in accordance with the district court's February 1989 order, issued a final amended compliance order to the Army, pursuant to CDH's authority under CHWMA. The final amended compliance order requires the Army to submit an amended Basin F closure plan, as well as plans and schedules addressing soil contamination, monitoring and mitigation, groundwater contamination, and other identified tasks for each unit containing Basin F hazardous waste as required under CHWMA. Appellants' App. at 96-103. The final amended compliance order also requires that CDH shall approve all plans and that the Army shall not implement any closure plan or work plan prior to approval in accordance with CHWMA. *Id.* at 98.

As a result of the final amended compliance order, the United States filed the present declaratory action, invoking the district court's jurisdiction under 28 U.S.C. § 2201. The United States' complaint sought

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Basin F was expressly excluded from the national priority list "because the EPA believed that Basin F might be subject to RCRA Subtitle C corrective action authorities and thus might be appropriate for deferral. . . ." 54 Fed.Reg. 10,512, 10,515 (1989). *See also* 48 Fed.Reg. 40,682 (1983) (describing EPA policy of deferring national priority listing of sites undergoing RCRA cleanup); 49 Fed.Reg. 40,323-40,324, 40,336 (1984). *See generally Apache Powder Co. v. United States,* 968 F.2d 66, 68 (D.C.Cir. 1992). When the EPA added Basin F to the national priority list in 1989, it indicated that Basin F should not have been deferred from listing under the policy in effect in 1987 because it had stopped receiving RCRA hazardous wastes prior to July 26, 1982 and did not certify closure prior to January 26, 1983. 54 Fed.Reg. at 10,515-10,516 & n.2.

an order from the federal district court declaring that the final amended compliance order is "null and void" and enjoining Colorado and CDH from taking any action to enforce it.[15] *Id.* at 13. Colorado counterclaimed requesting an injunction to enforce the final amended compliance order.[16] *Id.* at 35-41. On cross motions for summary judgment, the district court relied on CERCLA's provision which limits federal court jurisdiction to review challenges to CERCLA response actions, *see* 42 U.S.C. § 9613(h) (West Supp.1992), and held that "[a]ny attempt by Colorado to enforce [ ] CHWMA would require [the] court to review the [Army's CERCLA] remedial action . . . prior to [its] completion" and that "[s]uch a review is expressly prohibited by [CERCLA] § 9613(h)." *United States v. Colorado,* No. 89-C-1646, slip op. at 10 (D.Colo. Aug. 14, 1991) (Mem. Order & Op.). It is important to note that the district court distinguished its earlier order, which held that Colorado could enforce CHWMA despite the Army's CERCLA response

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[15] The United States filed the present action while the Army's motion for reconsideration of the district court's February 1989 order in Colorado's enforcement action was still pending. Following the district court's ruling in the present case, the district court dismissed Colorado's earlier enforcement action which was the subject of the district court's February 1989 order.

[16] Colorado also counterclaimed for civil penalties. The district court dismissed this counterclaim on sovereign immunity grounds, relying on this court's opinion in *Mitzelfelt v. Department of Air Force,* 903 F.2d 1293 (10th Cir.1990). *See United States v. Colorado,* No. 89-C-1646 (D.Colo. June 19, 1990) (order). Although Congress has subsequently amended RCRA to expressly allow for civil penalties to be enforced against federal facilities, *see supra* note 4, Colorado has not appealed the dismissal of its counterclaim for civil penalties.

action, *Colorado v. United States Dep't of the Army*, 707 F.Supp. at 1570, based on the EPA's intervening listing of Basin F on the national priority list. *United States v. Colorado*, No. 89-C-1646, slip op. at 4, 8, 1991 WL 193519. In doing so, the district court appears to have implicitly relied on § 9620(a)(4), which provides for the application of state laws concerning removal and remedial action at federal facilities not listed on the national priority list, in addition § 9613(h). Based on this reasoning, the district court granted summary judgment to the United States on its claims for declaratory and injunctive relief, denied Colorado's cross-motion for summary judgment, and enjoined Colorado and CDH from taking "any action to enforce the [ ] final amended compliance order." *Id.* at 10-11.

III.

Colorado filed a timely notice of appeal from the district court's order giving us jurisdiction over this matter. 28 U.S.C. § 1291. Colorado contends that § 9613(h) is not applicable to a state's efforts to enforce its EPA-delegated RCRA authority, that listing on the national priority list is immaterial, and that the district court's order amounts to a determination that CERCLA preempts a state's EPA-delegated RCRA authority contrary to well-settled principles.[17] In addition to arguing that § 9613(h) bars Colorado from enforcing its EPA-delegated RCRA authority, the

[17] Colorado also argues that the district court's order violates the separation of powers doctrine by allowing an executive branch agency to dictate the outcome of pending litigation. In light of our holding, we need not address this argument.

United States alternatively contends that CERCLA's provision, which grants the President authority to select the remedy and allow for state input through the ARAR's process, *see* 42 U.S.C. § 9621 (West Supp.1992), bars Colorado from enforcing state law independent of CERCLA. *See Hill v. Ibarra,* 954 F.2d 1516, 1525 n. 4 (10th Cir.1992) ("grant of summary judgment . . . may be upheld on any grounds supported by the record").

We review a district court order granting or denying summary judgment de novo, applying the same standard as the district court. *United States v. Hardage,* 985 F.2d 1427, 1432 (10th Cir.1993). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, we construe the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Hardage,* 985 F.2d at 1433.

As this is a case of statutory construction, our job is to effectuate the intent of Congress. *Colorado v. Idarado Mining Co.,* 916 F.2d 1486, 1494 (10th Cir.1990), *cert. denied,* __ U.S. __, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991). While our starting point is the statutory language, *Hallstrom v. Tillamook County,* 493 U.S. 20, 25, 28-29, 110 S.Ct. 304, 308, 309-311, 107 L.Ed.2d 237 (1989), we must also look to the design of the statute as a whole and to its object and policy. *Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990). *See also King v. St. Vincent's Hosp.,* __ U.S. __, __, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991) (statute must

be read as a whole because "meaning, plain or not, depends on context"). When Congress has enacted two statutes which appear to conflict, we must attempt to construe their provisions harmoniously. *Negonsott v. Samuels,* 933 F.2d 818, 819 (10th Cir. 1991), *aff'd,* __ U.S. __, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993). *See also County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* __ U.S. __, __, 112 S.Ct. 683, 692, 116 L.Ed.2d 687 (1992) ("Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is [our] duty . . . absent clearly expressed congressional intention to the contrary, to regard each as effective."). Even when a later enacted statute is not entirely harmonious with an earlier one, we are reluctant to find repeal by implication unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier statute and simply failed to do so expressly. *United States v. Barrett,* 837 F.2d 933, 934 (10th Cir 1988). *See also Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 470, 102 S.Ct. 1883, 1892, 72 L.Ed.2d 262 (1982) ("an implied repeal must ordinarily be evident from the language or operation of the statute"). We turn now to the application of these well-settled rules of statutory construction to this particular case.

IV.

The district court focused on CERCLA's provision governing civil proceedings which grants federal courts exclusive jurisdiction over all actions arising under CERCLA. 42 U.S.C. § 9613(b) (West Supp. 1992). As the district court recognized, § 9613(h) ex-

pressly limits this grant of jurisdiction by providing, with exceptions not relevant here, that "[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title. . . ." *Id.* § 9613(h). However, contrary to the district court's reasoning, § 9613(h) does not bar federal courts from reviewing a CERCLA response action prior to its completion; rather, it bars federal courts from reviewing any "challenges" to CERCLA response actions. This is a critical distinction because an action by Colorado to enforce the final amended compliance order, issued pursuant to its EPA-delegated RCRA authority, is not a "challenge" to the Army's CERCLA response action. To hold otherwise would require us to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention.

A.

Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem. CERCLA's "savings provision" provides that "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person[18] under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C.

[18] "Person" under CERCLA is defined to include the United States government. 42 U.S.C. § 9601(21) (West Supp. 1992).

§ 9652(d) (West 1983). Similarly, CERCLA's provision entitled "relationship to other laws" provides that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a) (West 1983). By holding that § 9613(h) bars Colorado from enforcing CHWMA, the district court effectively modified the Army's obligations and liabilities under CHWMA contrary to § 9652(d), and preempted Colorado from imposing additional requirements with respect to the release of hazardous substances contrary to § 9614(a).

As a federal facility, the Arsenal is subject to regulation under RCRA. *See* 42 U.S.C. § 6961 (West 1983). More importantly, because the EPA has delegated RCRA authority to Colorado, the Arsenal is subject to regulation under CHWMA. *Id. See also Parola v. Weinberger,* 848 F.2d 956, 960 (9th Cir.1988) (§ 6961 "unambiguously subjects federal instrumentalities to state and local regulation"). While the President has authority to exempt federal facilities from complying with RCRA or respective state laws "if he determines it to be in the paramount interest of the United States," 42 U.S.C. § 6961 (West 1983), noting in this record indicates that the Army has been granted such an exemption with respect to its activities at the Arsenal. Thus, Colorado has authority to enforce CHWMA at the Arsenal, and "[a]ny action taken by [Colorado] . . . [has] the same force and effect as action taken by the [EPA]. . . ." *Id.* § 6926(d).

Notwithstanding Colorado's RCRA authority over the Basin F cleanup, and CERCLA's express preservation of this authority, § 9613(h), which was en-

acted as part of SARA, limits federal court jurisdiction to review challenges to CERCLA response actions. Congress' expressed purpose in enacting § 9613(h) was "to prevent *private responsible parties* from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." H.R.Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2941 (emphasis added). Nonetheless, the language of § 9613(h) does not differentiate between challenges by private responsible parties and challenges by a state. Thus, to the extent a state seeks to challenge a CERCLA response action, the plain language of § 9613(h) would limit a federal court's jurisdiction to review such a challenge. *See, e.g., Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir.), *cert. denied*, 493 U.S. 991, 110 S.Ct. 538, 107 L.Ed.2d 535 (1989).

Be that as it may, an action by a state to enforce its hazardous waste laws at a site undergoing a CERCLA response action is not necessarily a challenge to the CERCLA action. For example, CDH's final amended compliance order does not seek to halt the Army's Basin F interim response action; rather it merely seeks the Army's compliance with CHWMA during the course of the action, which includes CDH approval of the Basin F closure plan prior to implementation. Thus, Colorado is not seeking to delay the cleanup, but merely seeking to ensure that the cleanup is in accordance with state laws which the EPA has authorized Colorado to enforce under RCRA. In light of §§ 9652(d) and 9614(a), which expressly preserve a state's authority to undertake such action, we cannot say that Colorado's efforts to enforce its EPA-delegated RCRA authority is a challenge to the Army's undergoing CERCLA response action.

The United States relies principally on two cases to support its claim that § 9613(h) bars any action by Colorado to enforce the final amended compliance order. In *Schalk v. Reilly,* 900 F.2d 1091 (7th Cir.), *cert. denied,* 498 U.S. 981, 111 S.Ct. 509, 112 L.Ed.2d 521 (1990), the Seventh Circuit held that § 9613(h) barred private citizens from bringing a CERCLA citizen suit which challenged a consent decree between the EPA and a responsible party on the grounds that failure to prepare an environmental impact statement violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* 900 F.2d at 1095. Responding to the citizens' argument that they were not challenging the remedial action but rather merely asking that certain procedural requirements be met, the court held that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute; the statute necessarily bars these challenges." *Id.* at 1097.

While we do not doubt that Colorado's enforcement of the final amended compliance order will "impact the implementation" of the Army's CERCLA response action, we do not believe that this alone is enough to constitute a challenge to the action as contemplated under § 9613(h). The plaintiffs in *Schalk* were attempting to invoke the federal court's jurisdiction under CERCLA's citizen suit provision. *See* 42 U.S.C. § 9659 (West Supp.1992). While one of the exceptions to § 9613(h)'s jurisdictional bar is for CERCLA citizen suits, such suits "may not be brought with regard to a removal where a remedial action is to be undertaken at the site." *Id.* § 9613(h)(4). Thus, the CERCLA

citizen suit in *Schalk* was jurisdictionally barred by the plain language of the statute. *See* 900 F.2d at 1095. *Accord Alabama v. EPA*, 871 F.2d at 1557. Unlike the plaintiffs in *Schalk*, Colorado has not asserted and need not assert jurisdiction under CERCLA's citizen suit provision to enforce the final amended compliance order; therefore, *Schalk*'s reasoning does not apply.

Nonetheless, the plain language of § 9613(h) bars federal courts from exercising jurisdiction, not only under CERCLA, but under *any* federal law to review a challenge to a CERCLA remedial action. *See* 42 U.S.C. § 9613(h) (West Supp.1992). In *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir.1991), the Third Circuit held that § 9613(h) barred the federal court from exercising federal question jurisdiction, 28 U.S.C. § 1331, under the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, in an action which sought to stay the EPA's CERCLA response action pending determination of whether property qualified for historic site status. 923 F.2d at 1021.

Like *Schalk*, *Boarhead* is also distinguishable from the present case. First, the plaintiff in *Boarhead* was a responsible party under CERCLA; therefore, permitting the plaintiff's action to proceed would have been contrary to Congress' expressed intent in enacting § 9613(h). Moreover, the plaintiff's complaint in *Boarhead* sought to stay the CERCLA remedial action; thus, the plaintiff's action under the Preservation Act clearly constituted a challenge to the CERCLA remedial action. *Boarhead*, 923 F.2d at 1015. *See also Alabama v. EPA*, 871 F.2d at 1559 (plaintiff's prayer for relief seeking to enjoin the EPA from participating in CERCLA remedial action "belie[d]" plaintiff's

assertion that it was not challenging the remedial action plan). Most importantly, the *Boarhead* court's application of § 9613(h) to the facts of that case did not "affect or modify in any way the obligations or liabilities" of a responsible party "under other Federal or State law . . . with respect to releases of hazardous substances," *see* 42 U.S.C. § 9652(d) (West 1983), and did not "preempt[ ] [the] state from imposing any additional liability or requirements with respect to the release of hazardous substances." *See id.* § 9614(a). In light of the plain language of §§ 9652(d) and 9614(a), and our responsibility to give effect to all of CERCLA's provisions, *Boarhead* cannot control this case.

B.

Not only is the district court's construction of § 9613(h) inconsistent with §§ 9652(d) and 9614(a) of CERCLA, it is also inconsistent with RCRA's citizen suit provision. *See* 42 U.S.C. § 6972 (West 1983 & Supp.1992). While CERCLA citizen suits cannot be brought prior to the completion of a CERCLA remedial action, *Schalk*, 900 F.2d at 1095, RCRA citizen suits to enforce its provisions at a site in which a CERCLA response action is underway can be brought prior to the completion of the CERCLA response action.

RCRA's citizen suit provision permits any person to commence a civil action against any other person, including the United States government or its agencies, to enforce "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A) (West Supp.1992). Such suits are

prohibited if the EPA or the state has already "commenced and is diligently prosecuting" a RCRA enforcement action. *Id.* § 6972(b)(1)(B). *See, e.g., Supporters to Oppose Pollution, Inc. v. Heritage Group,* 973 F.2d 1320, 1323-24 (7th Cir.1992). Federal courts have jurisdiction over such suits and are authorized "to enforce the permit, standard, regulation, condition, requirement, prohibition, or order. . . ." 42 U.S.C. § 6972(a) (West Supp.1992).

RCRA's citizen suit provision also permits any person to commence a civil action against any other person, including the United States government or its agencies, to abate an "imminent and substantial endangerment to health or the environment. . . ." *Id.* § 6972(a)(1)(B). These types of RCRA citizen suits are prohibited, not only when the EPA is prosecuting a similar RCRA imminent hazard action pursuant to 42 U.S.C. § 6973, but also when the EPA is prosecuting a CERCLA abatement action pursuant to 42 U.S.C. § 9606; the EPA is engaged in a CERCLA removal action or has incurred costs to initiate a RI/FS and is "diligently proceeding" with a CERCLA remedial action pursuant to 42 U.S.C. § 9604; or the EPA has obtained a court order or issued an administrative order under CERCLA or RCRA pursuant to which a responsible party is conducting a removal action, RI/FS, or remedial action. *Id.* § 6972(b)(2)(B). Federal courts have jurisdiction over RCRA citizen imminent hazard suits and are authorized "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste. . . ." *Id.* § 6972(a).

By prohibiting RCRA citizen imminent hazard suits with respect to hazardous waste sites where a

CERCLA response action is underway, while not prohibiting RCRA citizen enforcement suits with respect to such sites, Congress clearly intended that a CERCLA response action would not prohibit a RCRA citizen enforcement suit. Because the definition of "person" under RCRA includes a state, 42 U.S.C. § 6903(15) (West 1983), Colorado could enforce RCRA in federal court by relying on RCRA's citizen enforcement suit provision, 42 U.S.C. § 6972(a)(1) (West Supp.1992), provided that it complied with the requisite notice provisions. *See id.* § 6972(b)(1)(A). *See also Hallstrom v. Tillamook County,* 493 U.S. 20, 26, 110 S.Ct. 304, 309, 107 L.Ed.2d 237 (1989) ("compliance with . . . notice provision is a mandatory . . . condition precedent for suit"). Because CHWMA became "effective" pursuant the EPA's delegation of RCRA authority to Colorado, and the final amended compliance order was issued pursuant to CHWMA, Colorado could arguably seek enforcement of the final amended compliance order in federal court pursuant to § 6972(a)(1). However, we need not decide this issue. While Colorado's counterclaim sought enforcement of the final amended compliance order in the district court, Colorado asserted the counterclaim solely under CHWMA, claiming that it was compulsory pursuant to Fed.R.Civ.P. 13(a), and seeking to invoke the district court's ancillary jurisdiction. *See* Appellants' App. at 30. Thus, we do not express any opinion on whether federal court jurisdiction over Colorado's counterclaim is proper under § 6972(a)(1)(A). Nonetheless, our discussion of this provision is relevant to our determination that Congress did not intend a CERCLA response action to bar a RCRA enforcement action, or an equivalent action by a state which has

been authorized by EPA to enforce its state hazardous waste laws in lieu of RCRA.

C.

Rather than challenging the Army's CERCLA remedial action, Colorado is attempting to enforce the requirements of its federally authorized hazardous waste laws and regulations, consistent with its ongoing duty to protect the health and environment of its citizens. CERCLA itself recognizes that these requirements are applicable to a facility during the pendency of a CERCLA response action. *See Moskal v. United States,* 498 U.S. 103, 109-10, 111 S.Ct. 461, 465-66, 112 L.Ed.2d 449 (1990) (statutes must be construed to give effect to "every clause and word"). Further, RCRA contemplates that enforcement actions may be maintained despite an ongoing CERCLA response action, and we cannot say that CERCLA implicitly repealed RCRA's enforcement provision given CERCLA's clear statement to the contrary. *See Manor Care, Inc. v. Yaskin,* 950 F.2d 122, 127 (3d Cir.1991) ("Congress did not intend for CERCLA remedies to preempt complementary state remedies."). While the decision to use CERCLA or RCRA to cleanup a site is normally a "policy question [ ] appropriate for agency resolution," *Apache Powder Co. v. United States,* 968 F.2d 66, 69 (D.C.Cir.1992), the plain language of both statutes provides for state enforcement of its RCRA responsibilities despite an ongoing CERCLA response action. Thus, enforcement actions under state hazardous waste laws which have been authorized by the EPA to be enforced by the state in lieu of RCRA do not constitute "challenges" to CERCLA response actions; therefore, § 9613(h) does

not jurisdictionally bar Colorado from enforcing the final amended compliance order.

V.

Even if an action by Colorado to enforce the final amended compliance order would be a "challenge" to the Army's CERCLA response action, the plain language of § 9613(h) would only bar a federal court from exercising jurisdiction over Colorado's action. Colorado, however, is not required to invoke federal court jurisdiction to enforce the final amended compliance order. Rather, Colorado can seek enforcement of the final amended compliance order in state court. Therefore, § 9613(h) cannot bar Colorado from taking "any" action to enforce the final compliance order.

The final amended compliance order was issued by CDH pursuant to its authority under CHWMA. CHWMA not only authorizes CDH to issue compliance orders, it also authorizes CDH to request the state attorney general to bring suit for injunctive relief or civil or criminal penalties. Colo.Rev.Stat. § 25-15-308(2)(a) (Supp. 1992). *See also id.* § 25-15-309 (administrative and civil penalties); *id.* § 25-15-310 (criminal offenses-penalties). *Compare* 42 U.S.C. § 6928(a)(1) (West Supp.1992) (authorizing the EPA to issue RCRA compliance orders, assess civil penalties, and bring civil enforcement action); *Id.* § 6928(d) (criminal penalties for knowing violations of RCRA). Unlike RCRA-enforcement suits by the EPA which must be brought in federal court, 42 U.S.C. § 6928(a)(1) (West Supp.1992), CHWMA enforcement actions must be brought in the state "district court for the district in which the site or facility is . . .

located" or in the "district in which the violation occurs." Colo.Rev.Stat. §§ 25-15-305(2)(b), 25-15-309(1) (Supp.1992). As the operator of a federal facility subject to regulation under CHWMA, the Army is subject to "process or sanction" of the Colorado state courts with respect to enforcement of CHWMA. 42 U.S.C. § 6961 (West 1983). Because Colorado may bring an enforcement suit in state court, § 9613(h) does not preclude Colorado from taking "any" action to enforce the final amended compliance order.

VI.

By distinguishing its February 1989 order, which recognized that Colorado could enforce CHWMA with respect to Basin F, from its order in this case, which enjoined Colorado and CDH from taking any action to enforce the final amended compliance, based on the EPA's subsequent placement of Basin F on the national priority list, the district court also appears to have implicitly relied on 42 U.S.C. § 9620(a)(4) (West Supp.1992). Section 9620 sets forth CERCLA's application to federal facilities. Subsection (a)(4) provides, in relevant part, that "[s]tate laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priority list." *Id.* Apparently, the district court construed this subsection as precluding the application or enforcement of state laws concerning removal or remedial action at federal facilities which are listed on the national priority list.

As the United States candidly concedes, the district court's application of § 9620(a)(4) is incorrect. *See* Appellee's Br. at 36. At most, § 9620(a)(4) determines the controlling law, not federal court jurisdiction over actions by a state. Moreover, the district court's reasoning regards CHWMA as a state law "concerning removal and remedial action." While we recognize that CERCLA's definition of "removal and remedial action" is conceivably broad enough to encompass certain RCRA corrective actions, *see* 42 U.S.C. §§ 9601(23), 9601(24) (West Supp.1992), we believe that had Congress intended § 9620(a)(4) to exclude states from enforcing their EPA-delegated RCRA responsibilities, it would have expressly said so. The district court's reasoning is contrary to § 9620(i) which expressly preserves the obligations of federal agencies "to comply with any requirement of [RCRA] (including corrective action requirements)." 42 U.S.C. § 9620(i) (West Supp.1992). This provision indicates that Congress did not intend that RCRA, or state laws authorized by the EPA to be enforced in lieu of RCRA, to be equivalent to laws concerning removal and remedial actions.

Despite the United States' concession concerning the incorrect application of § 9620(a)(4), it argues that the listing of Basin F on the national priority list removes any doubt that Colorado's enforcement of CHWMA at the Arsenal is precluded by § 9613(h). However, the national priority list is nothing more than "the list of priority releases for long-term remedial evaluation and response." 40 C.F.R. § 300.425(b) (1992). It "serves primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to war-

rant remedial action."[19] S.Rep. No. 848, 96th Cong., 2d Sess. 60 (1980). Placement on the national priority list simply has no bearing on a federal facility's obligation to comply with state hazardous waste laws which have been authorized by an EPA delegation of RCRA authority or a state's ability to enforce such laws.

VII.

The United States alternatively contends that CERCLA's provision, which grants the President authority to select the remedy and allow for state input through the ARAR's process, *see* 42 U.S.C. § 9621 (West Supp.1992), bars Colorado from enforcing state law independent of CERCLA. This is a curious argument in light of §§ 9614(a) and 9652(d) which expressly preserve state RCRA authority, and we find it to be without merit.

A.

While the United States does not dispute that Congress intended states to play a role in hazardous

[19] The legal significance of a particular site being placed on the national priority list is that "[o]nly those releases included on the [national priority list] shall be considered eligible for Fund-financed remedial action." 40 C.F.R. § 300.425(b)(1) (1992). Given that federal facilities, like the Arsenal, are not eligible for Super-fund-financed remedial action, 42 U.S.C. § 9611(e)(3) (West Supp.1992); 40 C.F.R. § 300.425(b)(3) (1992), placement of a federal facility on the national priority list serves only informational purposes. *See* 54 Fed.Reg. 10,520, 10,521 (1989) (EPA Listing Policy for Federal Facilities) ("placing Federal facility sites on the [national priority list] serves an important informational function and helps to set priorities and focus cleanup efforts on those Federal sites that present the most serious problems").

waste cleanup, the United States argues that the states' role when a CERCLA response action is underway is confined to CERCLA's ARAR's process.[20] Undoubtedly, CERCLA's ARAR's provision was intended to provide "a mechanism for state involvement in the selection and adoption of remedial actions which are federal in character." *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1495 (10th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991). *See also United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1455 (6th Cir. 1991) (ARAR's provisions "reflect Congress' special concern that state interests in the health and welfare of their citizens be preserved, even in the face of a

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[20] CERCLA provides that "[t]he President shall select appropriate remedial actions determined to be necessary to be carried out under section 9604 . . . which are in accordance with this section, and to the extent practicable, the national contingency plan, and which provide for cost effective response." 42 U.S.C. § 9621(a) (West Supp.1992). Any hazardous substance remaining on site at the completion of the remedial action may be subject to a level or standard of control equivalent to any federal or state ARAR, including RCRA or state hazardous waste laws. *Id.* § 9621(d)(2)(A). The President has the authority to waive federal or state ARAR's in selecting a remedial action under certain circumstances. *See id.* § 9621(d)(4). When the President waives ARAR's with respect to federal facilities, the state may seek judicial review in federal court, limited to the administrative record, to determine whether the President's finding supporting the waiver is supported by substantial evidence. *Id.* § 9621(f)(3)(B)(i). If substantial evidence does not support the President's finding, a court may modify the remedial action to conform to the ARAR, *id.* § 9621(f)(3)(B)(ii); however, if the state fails to establish that the President's finding is not supported by substantial evidence, the state may pay the additional cost attributable to meeting the ARAR. *Id.* § 9621(f)(3)(B)(iii).

comprehensive federal environmental statute"). Nonetheless, nothing in CERCLA supports the contention that Congress intended the ARAR's provision to be the *exclusive* means of state involvement in hazardous waste cleanup.

Contrary to the United States' claim, Colorado is not invading the President's authority to select a CERCLA remedial action. Rather, Colorado is merely insuring that the Army comply with CHWMA which §§ 9614(a) and 9652(d) of CERCLA expressly recognize is applicable. Sections 9614(a) and 9652(d) were included within CERCLA when it was originally enacted in 1980. *See* Pub.L. No. 96-510, §§ 114(a), 302(d), 94 Stat. 2795, 2808 (1980). However, the ARAR's provision was not enacted until the 1986 amendments to CERCLA. *See* Pub.L. No. 99-499, § 121, 100 Stat. 1672 (1986). Certainly, Congress could not have intended the ARAR's provision to be the exclusive means of state involvement in hazardous waste cleanup as provided under §§ 9614(a) and 9652(d) when the ARAR's concept did not even come into being until six years after CERCLA was enacted.

Moreover, while the ARAR's provision requires the President to allow a state to participate in remedial planning and to review and comment on remedial plans, 42 U.S.C. § 9621(f)(1) (West Supp.1992), it only allows states to ensure compliance with state law at the completion of the remedial action. *See id.* §§ 9621(d)(2)(A), 9621(f)(2), 9621(f)(3). However, §§ 9614(a) and 9652(d) expressly contemplate the applicability of other federal and state hazardous waste laws regardless of whether a CERCLA response action is underway. Given that RCRA clearly applies during the closure period of a regulated facility, *see*

40 C.F.R. § 264.228 (1992); *id.* § 265.228, the ARAR's provision cannot be the exclusive means of state involvement in the cleanup of a site subject to both RCRA and CERCLA authority.

Contrary to the United States' claim, permitting state involvement in hazardous waste cleanup outside of CERCLA's ARAR's process, based on independent state authority, does not render the ARAR's process irrelevant. When a state does not have independent authority over the cleanup of a particular hazardous waste site, the ARAR's provision insures that states have a meaningful voice in cleanup. However, when, as here, a state has RCRA authority over a hazardous waste site, §§ 9614(a) and 9652(d) expressly preserve the state's exercise of such authority regardless of whether a CERCLA response action is underway.[21]

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[21] The United States relies on *Idarado Mining* and *Akzo Coatings* to support its claim that the ARAR's provision provides the exclusive means for state involvement in the cleanup of a hazardous waste site where a CERCLA response action is underway. In *Idarado Mining*, we held that § 9621(e)(2) which authorizes a state to "enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under" CERCLA in federal district court, did not authorize the district court to grant a state injunctive relief in the state's CERCLA response cost action. 916 F.2d at 1494. Unlike *Idarado Mining*, Colorado here is not seeking to broaden its § 9607 response action authority or § 9621(e)(2) ARAR enforcement authority under CERCLA.

In *Akzo Coatings*, the Sixth Circuit held that the terms of a consent decree between the EPA and a responsible party "set the parameters of relief available to the state" against the responsible party, and § 9621(f) precluded the state from pursuing alternative state remedies against the responsible party. 949 F.2d at 1454-55. Unlike the state in *Akzo Coatings*, Colorado is asserting its independent EPA-delegated RCRA authority rather than challenging the selection of a CERCLA remedy.

B.

The United States also argues that to allow Colorado to enforce the final amended compliance order would violate CERCLA's provision that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with [§ 9621]." 42 U.S.C. § 9621(e)(1) (West Supp.1992). While this provision arguably conflicts with §§ 9652(d) and 9614(a) when a state has been authorized to issue and enforce RCRA permits, the facts of this case do not require us to reconcile the potential conflict. The final amended compliance order does not require the Army to obtain a permit. Rather, it merely requires the Army to update its existing RCRA/CHWMA permit application to include all units currently containing Basin F hazardous waste, *see* Appellants' App. at 101, as required by both RCRA and CHWMA regulations applicable to interim status facilities.[22] *See* 40 C.F.R. § 270.72(a)(3); 6 Colo.Code Regs. 1007-3

[22] While Basin F lost its interim status on November 8, 1985, because the Army never requested a final Part B permit determination and never certified compliance with applicable groundwater monitoring requirements, *see* 42 U.S.C. § 6925(e)(2) (West Supp.1993), the Army is obligated to comply with RCRA and/or CHWMA regulations applicable to interim status facilities pending closure of Basin F pursuant to an approved closure plan. *See* 40 C.F.R. § 265.1(a) (1992) (standards for interim status facilities "define the acceptable management of hazardous waste during the period of interim status *and until certification of final closure*"); *id.* § 265.1(b) (interim status standards "apply . . . until either a permit is issued . . . *or until applicable . . . closure and post-closure responsibilities are fulfilled*). *See also* 6 Colo.Code Regs. 1007-3 § 265.1(a-b) (1993).

§ 100.11(d)(1) (1993). Thus, enforcement of the final amended compliance order would not violate § 9621 (e)(1).

C.

The United States also directs us to CERCLA's section governing "[s]ettlements," 42 U.S.C. § 9622 (West Supp.1992), and specifically its provision, within the "[s]pecial notice procedures" subsection, entitled "[i]nconsistent response action." *Id.* § 9622 (e)(6). This provision states that

> [w]hen either the President, or a potentially responsible party pursuant to an administrative order or consent decree under [CERCLA], has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

Id. While the relevance of § 9622(e)(6) to the present case is unclear, the United States relies on the EPA's interpretation of this provision in a policy statement concerning the listing of federal facilities on the national priority list. *See* 54 Fed.Reg. 10,520 (1989). In the course of discussing why it would not apply its policy of deferring placement of RCRA-subjected sites on the national priority list to federal facilities, the EPA recognized that when it undertakes a CERCLA response action at a site subject to state-delegated RCRA authority, a conflict may arise "from the overlap of the corrective action authorities of the two statutes." *Id.* at 10,522. The EPA takes the position

that § 9622(e)(6) gives the EPA final authority over the remedy when the conflicting views of the EPA and a RCRA-authorized state cannot be resolved in regard to a site where a RI/FS has been initiated. *Id.* at 10,523. In the EPA's view, § 9622(e)(6)'s authorization requirement applies, not only to a potentially responsible party's independent remedial action, but also to any action by a party which has been ordered by the state under its RCRA authority "as both types of action could be said to present a potential conflict with a CERCLA authorized action." *Id.* Thus, in the case of a conflict between the EPA and the state, § 9622(e)(6) authorizes the EPA to withhold authorization to a potentially responsible party from going forward with a RCRA corrective action ordered by the state. *Id.* Not surprisingly, the United States argues for deference to the EPA's interpretation of § 9622 (e)(6). *See Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1278 (10th Cir.1989).

The EPA's interpretation of § 9622(e)(6) has several problems, not the least of which is that it permits the EPA to preempt state law contrary to § 9614(a) and to modify a responsible party's obligations and liabilities under state RCRA programs contrary to § 9652(d). Section § 9622(e)(6) makes absolutely no mention of RCRA-authorized state actions, and it seems highly suspect that Congress intended this provision which is buried within a subsection entitled "notice provisions" in a section addressing settlements with private responsible parties to resolve conflicts between state-RCRA laws and CERCLA response actions. *See* H.R.Rep. No. 253(I), 99th Cong., 2d Sess. 100 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2882 (§ 9622 was "designed to encourage and facilitate negotiated private party cleanup").

Moreover, applying the EPA's interpretation of § 9622(e)(6) to federal facilities is contrary to the plain language of CERCLA's section specifically addressing federal facilities. 42 U.S.C. § 9620 (West Supp.1992). Congress expressly provided within the federal facilities section that "[n]othing in this section shall affect or impair the obligation of any department, agency or instrumentality of the United States to comply with any requirement of [RCRA] (including corrective action requirements)." *Id.* § 9620(i). while the EPA takes the position that its interpretation of § 9622(e)(6) is not inconsistent with § 9620(i) because RCRA requirements can be achieved through the ARAR's process pursuant to § 9621(d)(2), 54 Fed.Reg. at 10,526, the ARAR's process cannot be the exclusive means of a RCRA-authorized state's involvement in the cleanup of a RCRA-regulated site because otherwise a party's obligations under other federal and state hazardous waste laws would be modified during the closure period contrary to § 9652(d), and state law would be preempted contrary to § 9614(a). *See supra.* By the same reasoning, if the ARAR's process constituted a state's sole means of enforcing its RCRA program at a federal facility, the federal agency's RCRA obligations prior to completion of the CERCLA remedial action would be "affected or impaired" contrary to the plain language of § 9620(i). *See* H.R.Rep. No. 253(I), at 95, *reprinted in* 1986 U.S.C.C.A.N. at 2877 (federal facilities section "provides the public, states, and [the EPA] increased authority and a greater role in assuring the problems of hazardous substance releases are dealt with by expeditious and appropriate response actions").

Finally, § 9622(e)(6) is triggered by the initiation of a RI/FS. The federal facilities provision requires federal agencies to commence a RI/FS within six months after the facility is included on the national priority list, 42 U.S.C. § 9620(e)(1) (West Supp. 1992), and commence a remedial action within fifteen months of the study's completion, *id.* § 9620(e)(2), while at the same time providing that this section does not affect or impair the agency's RCRA corrective action requirements. *Id.* § 9620(i). Certainly, Congress could not have intended to require a RI/FS and RCRA compliance in one section while at the same time barring RCRA compliance when a RI/FS is initiated in another section. As summed up by one commentator, "if placement on the [national priority list], completion of a RI/FS, and initiation of remedial action pursuant to [§ 9620] does not impair RCRA obligations, mere initiation of the required investigation cannot have this effect." Joseph M. Willging, *Why the EPA's Current Policies on Potential CERCLA-RCRA Authority Conflicts May be Wrong,* 1 Fed. Facilities Envtl. J. 69, 82-83 (Spring 1990).

Because the EPA's interpretation of § 9622(e)(6) is "contrary to the plain and sensible meaning" of §§ 9622, 9614(a) and 9652(d), and, when applied to federal facilities, § 9620, we do not afford it any deference. *Hill,* 886 F.2d at 1278 (quotations omitted). In our view, § 9622(e)(6) does not bar a state from exercising its EPA-delegated RCRA authority at a federal facility where a RI/FS has been initiated.

VIII.

We REVERSE the district court's grant of summary judgment for Plaintiff-Appellee, the United

States. We REMAND to the district court with instructions to VACATE the order prohibiting Defendant-Appellants, Colorado and CDH, from taking any action to enforce the final amended compliance order and for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-1646

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF COLORADO AND THE COLORADO DEPARTMENT OF HEALTH, DEFENDANTS

[Filed Aug. 14, 1991]

MEMORANDUM OPINION AND ORDER

CARRIGAN, J.

Plaintiff, United States of America, commenced this action seeking declaratory and injunctive relief to prevent the defendants, State of Colorado and the Colorado Department of Health, from asserting state administrative authority to regulate hazardous waste management activities at Basin F, a hazardous waste disposal pond on the Rocky Mountain Arsenal (the Arsenal) northeast of Denver, Colorado. Defendants have moved for partial summary judgment. They seek an order declaring that The Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987) does not preclude their asserting regulatory authority over the Basin F cleanup. Plaintiff has responded by opposing

the defendants' motion and itself seeking summary judgment based on the contention that the defendants' asserted authority to regulate would unlawfully challenge and interfere with the federal government's ongoing CERCLA response action.

The parties have exhaustively briefed the issues and presented oral argument. Both motions are ripe for decision. Jurisdiction exists pursuant to 28 U.S.C. § 1331.

In October 1984, the United States Army, acting pursuant to CERCLA, commenced a remedial investigation/feasibility study (RI/FS) at the Arsenal.[1] On November 2, 1984, Colorado was authorized by the EPA to administer its own hazardous waste management program under the Colorado Hazardous Waste Management Act (CHWMA), Colo. Rev. Stat. § 25-15-301 *et seq.* (1989) in lieu of the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* On August 21, 1987, the Arsenal, excluding Basin F, was listed on the National Priorities List (NPL). On February 17, 1989, the United States and Shell Oil Co. submitted, in this court's case No. 83-C-2379, a Federal Facility Agreement with respect to the Arsenal. That agreement was executed by the EPA, the Army, the Department of the Interior, the Agency for Toxic Substances and Disease Registry and Shell Oil Company.

In November 1984, the Army submitted to the Colorado Department of Health (CDH) a plan to close Basin F. Almost a year later, in October 1985, the CDH disapproved the Army's plan, prompting the

[1] Colorado contests when the Army commenced its RI/FS. (Defendant's motion for partial summary judgment, at 47 n. 1).

Army to submit to the CDH a second closure plan in December 1985. The CDH also found the Army's second plan deficient, and in May 1986, issued its own Basin F Proposed Partial Closure Plan. Colorado's final Modified Basin F Closure Plan was issued October 1, 1986. According to Colorado, after the Army made clear that it was not going to comply with that plan, the State amended its complaint in *Colorado v. United States Dept. of Army,* No. 86-C-2524 (D. Colo. November 30, 1987) (first amended complaint) to seek enforcement of the State plan.

On February 24, 1989, in *Colorado v. United States Dept. of Army,* this court responded to motions filed by the United States to contest Colorado's attempts at enforcing compliance with its closure plan, by stating:

> "In the First Amended Complaint, the plaintiff asserts claims against the Army for: (1) failure to close Basin F in compliance with the Basin F Closure Plan (First Claim); (2) failure to comply with Colorado's Ground Water Monitoring Regulations, a claim with three subclaims, and essentially a reassertion of three of the claims set forth in the plaintiff's initial complaint (Second Claim); and (3) failure to pay annual operating and waste volume fees, in violation of §§ 100.31(a) and (b) of State Fee Regulations, 6 CCR 1007-3, Part 100.
>
> * * *
>
> The Army has moved to dismiss the plaintiff's First Amended Complaint, asserting that the United States has not waived its sovereign immunity as to these claims under RCRA § 6001,

[42 U.S.C. § 6961]. Defendant Army's argument in part emphasizes that I presently have pending before me two actions directed at cleanup of the Arsenal as a whole. As stated above, these consolidated cases are *State of Colorado v. United States,* Civil Action No. 83-2386, and *United States v. Shell Oil Company,* Civil Action No. 83-C-2379. Both cases were filed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.* CERCLA was amended by the 1986 Superfund Amendments and Reauthorization Act ("SARA"), Pub.L.No. 99-499, 100 Stat. 1615.

Defendant Army does not dispute that RCRA § 6001 [42 U.S.C. § 6961], read in conjunction with RCRA § 7002 [42 U.S.C. 6972], contains a waiver of federal sovereign immunity. Rather, the Army asserts that sovereign immunity is not waived under those sections when there is an ongoing CERCLA cleanup action at the site that addresses hazardous waste requirements that are the same in substance as those sought to be enforced by the state under RCRA. In essence, the Army argues that CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal." *Colorado v. United States Dept. of Army,* 707 F. Supp. 1562, 1564-65 (D. Colo. 1989).

In that action, this court held that *because Basin F was not listed on the National Priorities List,* "RCRA enforcement by the State is not precluded by CERCLA. . . ." *Colorado v. United States Dept. of Army,* 707 F. Supp. at 1570.

On September 1, 1989, the state issued its Compliance Order seeking to force the Army: (1) to amend the final closure plan; (2) to close Basin F in a manner protective of human health and the environment pursuant to the requirements of the amended plan, the CHWMA; and (3) to comply with the other CHWMA requirements during the closure process.

Defendants assert that under Colorado's hazardous waste management program, all hazardous wastes must be treated, removed from the site, or disposed of on site in accordance with the state's approved closure plan. 6 Colo. Code Regs. § 265.113(a) (1989). To comply with the CHWMA, a site must, among other things, be closed in a manner that is protective of human health and the environment by controlling, minimizing, or eliminating releases of hazardous waste to ground or surface waters and to the air, and by removing or decontaminating contaminated soils. 6 Colo. Code Regs. §§ 265.111(b) and 265.112(b)(4).

As a preliminary matter, I note that in two of their counterclaims, the state defendants seek civil penalties against the federal government for violating the CHWMA. Defendants, however, have conceded that under *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990), those penalties cannot be assessed. In *Mitzelfelt* the Tenth Circuit held that RCRA § 6001, 42 U.S.C. § 6961, did not waive the sovereign immunity of the United States with respect to civil penalties. Further, the defendants have provided no evidence that Congress has enacted any clarifying language in any amendments to RCRA that would entitle it to assess civil penalties for violations of RCRA. Therefore, the plaintiff is entitled to summary judgment on this issue.

At the heart of the remaining dispute is the question whether the State of Colorado has authority to regulate the Basin F area at the Arsenal. In *Colorado v. United States Dept. of Army,* 707 F. Supp. 1562, I concluded that Colorado could, through enforcement of the CHWMA, regulate Basin F. Seventeen days after that ruling, however, on March 13, 1989, the EPA listed Basin F on the National Priority List (NPL) to become effective April 12, 1989. Thus, the dispositive question here is whether placing Basin F on the NPL divested this court of subject matter jurisdiction, after years of litigation, over Colorado's attempts to enforce the CHWMA at Basin F. The jurisdiction in question vested when *Colorado v. United States Dept. of Army* was filed on December 15, 1986.

Except as provided by 42 U.S.C. § 9613(a) and (h), United States District Courts have exclusive original jurisdiction over all controversies arising under CERCLA. 42 U.S.C. § 9613(b). Plaintiff asserts that § 9613(h) divests this court of subject matter jurisdiction. In pertinent part, that section states:

> "**Timing of review.** No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 104 [42 U.S.C. § 9604], or to review any order issued under section 106(a) [42 U.S.C. § 9606(a)], in any action except one of the following:
>
> * * *
>
> (4) An action under section 310 [42 U.S.C. § 9659] (relating to citizens suits) alleging that the removal or remedial action taken under section 104 [42 U.S.C. § 9604] or secured under section

> 106 [42 U.S.C. § 9606] was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site."

Although subsections (b) and (h) may appear to be in conflict, they are not. Subsection (b) provides that the district courts have exclusive jurisdiction over controversies arising under CERCLA. Pursuant to subsection (h), however, that jurisdiction does not attach until after a remedial action is completed.

Unquestionably, certain portions of CERCLA's legislative history indicate that Congress did not intend that § 9613(h) bar pre-completion judicial review in cases such as this. In deciding a question of statutory construction, however, I must begin with the words of the statute. *Demarest v. Manspeaker,* 111 S.Ct. 599, 602 (1991). Legislative history "can be a legitimate guide to a statutory purpose obscured by ambiguity, but '[i]n the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.'" *Burlington N. R. Co. v. Oklahoma Tax Comm'n,* 481 U.S. 454, 461 (1987) (citations omitted).

Moreover, the United States Supreme Court has held that if a statute's terms are unambiguous, judicial inquiry into Congressional intent is inappropriate, unless exceptional circumstances dictate otherwise. *Id.; Demarest,* 111 S.Ct. at 603. Thus absent ambiguity in the statutory language, lower federal courts are bound to apply a literal interpretation to a statutes words even where it may be apparent that Congress must have intended something other than the narrow, exact meaning of the statutory language.

In another CERCLA case this court proceeded to a lengthy and expensive trial and thereafter granted the state injunctive relief based on the court's reading of the statute as implying authority to employ mandatory injunction procedures as the most efficacious means of providing the state the practical, enforceable participation in CERCLA cleanups this court felt Congress clearly had intended. *State of Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227 (D. Colo. 1989). The Court of Appeals, however, reversed, applying a narrow, literal reading of the statute that denied the state injunctive relief. *State of Colorado v. Idarado Mining Co.*, 916 F.2d 1486 (10th Cir. 1990).

In *United States v. Durre,* 87-CR-386 (D. Colo. 1987), this court looked beyond literal statutory language to conclude that 28 U.S.C. § 1821(a)'s legislative history indicated that Congress did not intend prison inmates to be paid witness fees when subpoenaed and brought by writ to court to testify on behalf of fellow inmates. Similarly interpreting congressional intent, the Tenth Circuit affirmed in a split decision. *Demarest v. Manspeaker,* 884 F.2d 1343 (10th Cir. 1989). But the United States Supreme Court reversed, holding that resort to legislative history was improper because the statute was unambiguous. *Demarest,* 111 S.Ct. at 604. Ninety-one days after the Supreme Court announced its decision in *Demarest*, the President signed into law a bill plainly stating that incarcerated witnesses are not entitled to witness fees under § 1821, thus expressing the intent this court initially, but erroneously, had found to be implied. Thus was proved the adage that the best way to change an unreasonable law is to enforce it.

Section 9613(h) unambiguously indicates that this court lacks jurisdiction for pre-completion review of

the remedial action presently underway at Basin F now that it has been placed on the NPL. Therefore I conclude, as I must, that judicial inquiry into Congressional intent is prohibited. The statute's legislative history is irrelevant; if Congress intends a different result it is for Congress to amend the statute.

I note that this court has been divested of subject matter jurisdiction by the executive branch's action, through its agency, the EPA, (a party to this overall litigation) placing Basin F on the NPL. In other words, the executive, at the request of its litigant agency, has divested a federal court of its power to fully adjudicate a matter that has been in litigation before it for years. By thus granting the executive branch authority to place sites on the NPL, Congress has apparently delegated a portion of its authority to decide what cases a federal district court has the power to hear.

While it seems irrational in the context of separation of powers to allow the executive branch, after litigating a suit for years, suddenly to divest the court of jurisdiction by the administrative act of adding the site at issue to a list, that is the plain meaning of the statute's words. Unfortunately, CERCLA was enacted rather hastily near the end of a session and as the result of many last minute compromises. Thus some of the statute's provisions are not clear, and it contains many interstitial spaces left by Congress to be filled by judicial interpretation. The language here at issue, however, which results in revoking this court's subject matter jurisdiction, is clear.

Article III of the United States Constitution and the Judiciary Act of 1789 relegate to Congress authority to define the jurisdiction of this court. Thus a

court can be divested of statutory jurisdiction in a particular case by legislation even if not enacted until after the court has begun processing the case. *Bruner v. United States,* 343 U.S. 112, 115 (1952); *compare Phillips Petroleum Co. v. United States Environmental Protection Agency,* 803 F.2d 545, 551 (10th Cir. 1986) (Congress may *expand* a court's jurisdiction while a case is pending before it.)

Here, however, the question is somewhat more complicated than in *Bruner*; *i.e.,* whether Congress may be statute delegate to an executive branch administrator acting in the name of the President, the power to divest a federal district court of jurisdiction during litigation of a case over which that court otherwise has jurisdiction. Recent separation of powers cases have not bolstered, but rather have eroded, that historic buttress of judicial branch independence. See, *e.g., Mistretta v. United States,* 488 U.S. 361 (1989) (delegation by Congress to sentencing commission appointed by the President with the advice and consent of the Senate). Therefore there is no reason for this court to anticipate that the Supreme Court would disapprove the delegation by Congress to the President in this case.

Any attempt by Colorado to enforce the CHWMA would require this court to review the remedial actions selected under 42 U.S.C. § 9604 prior to their completion. Such a review is expressly prohibited by § 9613. Therefore, although the statute's legislative history indicates that Congress did not intend to foreclose such judicial review in all situations, I conclude that until the ongoing remedial action at Basin F is completed, CERCLA prohibits this court from reviewing it. In addition, Colorado is precluded from

enforcing Final Amended Compliance Order No. 89-05-2301.

Accordingly IT IS ORDERED that:

(1) Plaintiff's motion for summary judgment is granted;

(2) Defendants' motion for summary judgment is denied;

(3) Defendants' counterclaims are dismissed;

(4) The United States shall not be subjected to civil penalties provided in Colo. Rev. Stat. § 25-15-309 (1982), and the defendants shall not attempt to impose upon or collect from the United States any such civil penalties for actions arising out of the United States' activities at the Rocky Mountain Arsenal;

(5) Defendants shall not take any action to enforce their Final Amended Compliance Order No. 89-05-2301;

(6) The parties and their counsel shall meet and confer with the parties and their counsel from cases 83-C-2379, 83-C-2386 and 86-C-2524 within eleven days after this memorandum order is filed to determine what affect the order has on those cases. They are encouraged to use the good offices of the Special Master previously appointed in facilitating this conference. The parties shall report to this court in writing by August 30, 1991, stating the results of that meeting. The parties shall jointly submit a brief draft order disposing of all motions in those cases affected by this order in a manner consistent with this order; and

(7) The clerk of this court shall enter a final judgment consistent with this opinion.

Dated at Denver, Colorado August 14, 1991.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
United States District Judge

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

Magistrate Hilbert Schauer

Robert Foster, Esq.
Bradley Bridgewater, Esq.
U.S. Department of Justice
999 18th St. #501
Denver, CO 80202

James Ellman, Esq.
Nettie Corrigan, Esq.
First Assistant Attorney General
1560 Broadway #250
Denver, CO 80202

Linnea Brown, Esq.
1700 Lincoln #4100
Denver, CO 80203

Michael J. Norton
U.S. Attorney

/s/ ANITA MOORE
Deputy Clerk
Dated: August 14, 1991
Re: 89-C-1646

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-1646

UNITED STATES OF AMERICA

versus

STATE OF COLORADO AND
THE COLORADO DEPARTMENT OF HEALTH

[Filed Aug. 15, 1991]

JUDGMENT

Pursuant to and in accordance with the Order entered by the Honorable Jim R. Carrigan, on August 14, 1991.

It is ORDERED that Plaintiff, the United States of America's motion for summary judgment is granted; defendants, State of Colorado and the Colorado Department of Health's motion for summary judgment is denied; defendants' counterclaims are dismissed; and the United States shall not be subjected to civil penalties; defendants shall not attempt to impose upon or collect from the United States any civil penalties for actions arising out of the United States' activities at the Arsenal; defendants shall not take

any action to enforce their Final Amended Compliance Order No. 89-05-2301.

FOR THE COURT:

James R. Manspeaker, Chief

By:
/s/ Stephen P. Ehrlich
Chief Deputy Clerk

Approved:
/s/ Jim R. Carrigan
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1360

UNITED STATES OF AMERICA

versus

STATE OF COLORADO AND
THE COLORADO DEPARTMENT OF HEALTH

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Entered June 30, 1993

ORDER

Before McKAY, CHIEF JUDGE, and HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BLADOCK, BRORBY, EBEL and KELLY, Circuit Judges and O'CONNOR*, Senior District Judge.

This matter comes on from consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

---

* Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

ENTERED FOR THE COURT:

By:
/s/ Robert L. Hoecker
Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1360

UNITED STATES OF AMERICA

versus

STATE OF COLORADO AND
THE COLORADO DEPARTMENT OF HEALTH

Entered July 9, 1993

ORDER

Before McKAY, CHIEF JUDGE, and HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BLADOCK, BRORBY, EBEL and KELLY, Circuit Judges and O'CONNOR*, Senior District Judge.

The order issued June 30, is reissued nunc pro tunc to read as follows:

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

---

* Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision, except insofar as the opinion of April 6, 1993, was amended June 30, 1993.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

ENTERED FOR THE COURT:

By:
/s/ Robert L. Hoecker
Clerk

APPENDIX F

DEPARTMENT OF HEALTH
STATE OF COLORADO

FINAL AMENDED COMPLIANCE ORDER No. 89-05-2301

IN THE MATTER OF UNITED STATES DEPARTMENT OF THE ARMY, ROCKY MOUNTAIN ARSENAL

This Final Amended Compliance Order ("Final Compliance Order") is being issued by the Colorado Department of Health through the Hazardous Materials and Waste Management Division ("CDH") to the United States Department of the Army ("Army") pursuant to CDH's authority under Section 25-15-308, C.R.S. (1982 & 1988 Supp.). This Final Amended Compliance Order No. 89-05-2301 replaces and supersedes Compliance Order No. 89-05-2301 issued on May 23, 1989, and the amendment dated May 30, 1989, and the Amended Compliance Order dated June 16, 1989.

GENERAL FINDINGS

1. The United States is the owner and the Army is the operator of the Rocky Mountain Arsenal ("Arsenal"). The Arsenal is located in Commerce City, Colorado, and occupies approximately 27 square miles north of Denver's Stapleton Airport. Beginning in 1942, the United States has used the Arsenal for the manufacture, assembly, detoxification, and disposal

of chemical warfare agents, chemical products, incendiary munitions, chemical munitions, and chemical agents, and other hazardous materials. From 1946 until about 1987, portions of the Arsenal were leased to private industry.

2. In 1980, the Army submitted to the Environmental Protection Agency ("EPA") a timely notification form and Part A of its Resource Conservation and Recovery Act ("RCRA") permit application for the Arsenal, and thereby achieved interim status for the Arsenal pursuant to RCRA Section 3005(e). The Army's Part A permit application included Basin F as a hazardous waste surface impoundment.

3. The Army constructed Basin F, a 92.7 acre lined basin, in 1956 for the disposal of contaminated liquid wastes generated in the course of Army and Shell Oil Company manufacturing and processing activities at the Arsenal. Basin F is located in section 26 of the Arsenal.

4. Basin F was used from 1957 until at least 1982 for the disposal of various hazardous and acutely hazardous liquid wastes, many of which are listed acutely hazardous wates, listed toxic hazardous wastes, and exhibit the characteristics of hazardous waste.

5. During 1988, the Army removed most of the liquid hazardous waste remaining in Basin F and is now storing that liquid in three tanks and at least one surface impoundment.

6. The Army continues to store soils containing acutely hazardous and toxic wastes in Basin F. Unexcavated contaminated soils are stored within Basin F, and excavated contaminated soils are stored in a waste pile which is situated within Basin F.

7. The Army submitted the original RCRA Part B permit application for the Arsenal to the EPA on or

about May 23, 1983, and submitted the original Basin F closure plan to EPA the following month.

8. On November 2, 1984, Colorado received authorization from EPA to enforce its state hazardous waste management laws in lieu of RCRA. 49 Fed. Reg. 41,036 (1984).

9. In November 1984, upon receipt by Colorado of authority from EPA to enforce state hazardous waste management laws in lieu of RCRA, the Army submitted its RCRA Part B permit application for the Arsenal and its Basin F RCRA closure plan to CDH.

10. After several iterations, CDH issued the final, approved Basin F Closure plan ("Basin F Closure Plan") on October 1, 1986, pursuant to 6 CCR 1007-3, Part 265, subpart G.

11. The Basin F Closure Plan became effective October 2, 1986, as a final order of CDH.

12. On October 14, 1987, the Army informed CDH of its opinion that Basin F was no longer appropriate for RCRA closure jurisdiction and that it was therefore withdrawing the Basin F Closure Plan and terminating interim status.

13. The Army has performed a partial cleanup of Basin F pursuant to what it has termed an "interim response action" purportedly in compliance with CERCLA.

14. On February 24, 1989, the Federal District Court of Colorado held that a CERCLA action does not take precedence over RCRA enforcement actions and that state RCRA-based actions are preserved despite an ongoing CERCLA action. *State of Colorado v. United States Dept. of the Army,* Civil Action No. 86-C-2524, at pp. 16, 18.

15. Basin F and all units containing Basin F hazardous waste are regulated by state hazardous waste

management laws and regulations pursuant to Section 25-15-303, C.R.S. (1982 & 1988 Supp.).

16. On May 1, 2, 10, 15, 17, 19, 22, and 23, 1989, inspectors for CDH conducted inspections pertaining to hazardous waste management units containing Basin F hazardous waste to evaluate compliance with the state hazardous waste management laws and implementing regulations.

17. On May 23, 1989, CDH issued Compliance Order No. 89-05-2301 to the Army. That Order was received by the Army via United States mail and/or by fax on May 24, 1989. That Order was also received by the Army by certified mail on May 24, 1989.

18. On May 30, 1989, CDH issued an Amended Compliance Order No. 89-05-2301. That Order was received by the Army via hand delivery on May 30, 1989.

19. On June 16, 1989, CDH issued Amended Compliance Order No. 89-05-2301. That Amended Compliance Order was received by the Department of Justice on June 16, 1989 and by the Army at the Arsenal on June 19, 1989 via hand delivery. The Amended Compliance Order invited the Army to an Informal Conference and invited the Army to provide CDH with information to contest any findings or explain any circumstances that tend to mitigate the stated violations.

20. On Friday, July 7, 1989, the Army submitted to CDH a draft "Basin F Interim Response Action Operation/Maintenance Manual and Inspection Procedures" ("O & M Plan"). The O & M Plan includes inspection schedules, a ground water monitoring plan, an air quality monitoring plan, and a contingency plan for Basin F. Such schedules and plans were

ordered in the Amended Compliance Order dated June 16, 1989.

21. The O & M Plan was not approved by CDH because significant portions failed to comply with RCRA/CHWMA regulations. The reasons therefore were provided to the Army on August 7, 1989.

22. An Informal Conference was requested by the Army. That conference was held on Monday, July 10, 1989 and was transcribed by a certified court reporter at the request of the Department of Justice.

23. On July 17, 1989 and August 21, 1989, the Army submitted to CDH documents regarding limited measurements and sampling from the leak detection systems of various Basin F hazardous waste management units and and [*sic*] on July 17, 1989, submitted a metallurgist's letter regarding Tank No. 2. The Army has submitted no further information regarding the status of the Basin F hazardous waste management units.

24. The Amended Compliance Order is revised in order to reflect information received from the Army since the issuance of the Amended Compliance Order.

25. On July 14, 1989, the State of Colorado received final authorization to operate its hazardous waste management program as revised in the September 30, 1988 application in lieu of the federal hazardous waste program.

26. The Amended Compliance Order is revised in order to include the regulations authorized for state implementation on July 14, 1989 by EPA.

FIRST AND SECOND VIOLATIONS
(Failure To Comply With The Basin F Closure Plan)

27. The General Findings set forth in paragraphs 1 through 26 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

28. The Basin F Closure Plan provides that closure activities occur generally as follows. All liquids were to be removed from Basin F by October 1987, stored on-site in tanks, and finally treated or disposed by October 1988. The Army was to propose a final excavation plan for the cleanup of Basin F contaminated soil by October 1987, and by April 1988 all contaminated Basin F solids were to be stored in an interim waste pile. By October 1988, the Army was to submit work plans for the treatment and disposal of Basin F solids, and by October 1991, all solids resulting from treatment of Basin F liquid and/or excavation of Basin F are to be finally treated or disposed. Concurrently with the removal and storage of hazardous waste, the Army is to identify the extent of waste migration beneath Basin F and continue ground water assessment monitoring. Finally, by October 1987, an interim ground water containment/treatment system was to be operated north of Basin F.

29. The Army has stated that its activities, with respect to Basin F hazardous waste, have not been performed pursuant to the Basin F Closure Plan. It has violated almost every provision of the Basin F Closure Plan. The Army has failed to comply with schedules, health and safety requirements, require-

ments for submission of work plans, and other requirements contained in the Basin F Closure Plan. Examples include the Army's failure to: install an interim groundwater treatment system; to conduct the required soil contamination assessment; to propose soil performance standards; to excavate to such soil performance standards and place all such excavated soils into a waste pile; to timely remove all the liquids from Basin F; to place all Basin F liquids in storage tanks; and to complete treatment and disposal of Basin F liquids.

Conclusions Of Law

30. Pursuant to 6 CCR 1007-3, Section 265.113(a) (10-87), all hazardous wastes must be treated, removed from the unit, or disposed of onsite in accordance with the approved closure plan. Pursuant to Section 265.113(b), closure activities must be completed in accordance with the approved closure plan.

31. The Army's failure to comply with the schedules, perform prescribed closure activities, submit the required work plans, and comply with all other requirements of the Basin F Closure Plan constitutes violations of 6 CCR 1007-3, Section 265.113(a) and (b) (10-87).

32. The Army's failure to comply with the schedules, perform prescribed closure activities, submit the required work plans, and comply with all other requirements of the Basin F Closure Plan constitutes violations of a final agency order, the Basin F Closure Plan.

THIRD VIOLATION
(Failure to Amend the Basin F Closure Plan)

33. The General Findings set forth in paragraphs 1 through 32 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

34. The Army claims unexpected events have occurred during closure activities. The Army has made major changes in operations and facility design which affect the Basin F Closure Plan and which were not authorized by the closure plan. For example, the Army characterizes the existence of millions of gallons in excess of the estimated quantity of Basin F liquids as an unexpected event. The Army did not have the tank capacity to contain all of the Basin F liquid hazardous waste and constructed surface impoundments for storage of the waste, thus altering the facility design and operation.

35. The Army changed the expected year of closure of Basin F. The Basin F Closure Plan requires closure of Basin F and final management of liquid and solid hazardous waste by October 1991. The Army's projections for a decision regarding the manner of final closure of Basin F and management of Basin F hazardous wastes is scheduled for 1993. The final closure of Basin F and management of Basin F hazardous waste probably will not be complete for years thereafter.

36. The Army failed to amend the Basin F Closure Plan even though there were claimed unexpected events during closure, changes in the operations and facility design, and changes in the expected year of closure.

Conclusions of Law

37. 6 CCR 1007-3, Section 265.112(c)(1) (9-88), requires that an owner or operator must amend a closure plan whenever: (i) changes in operating plans or facility design affect the closure plan; or (ii) there is a change in the expected year of closure; or (iii) in conducting partial or final closure activities, unexpected events require a modification off the closure plan. Section 265.112(c)(2) requires submittal of an amendment 60 days prior to a proposed change in facility design or operation and no later than 30 days after an unexpected event occurs during closure.

38. The Army's failure to amend the Basin F Closure Plan when there were changes in the operating plan and design, a change in the expected year of closure, and unexpected events constitutes violations of 6 CCR 1007-3, Section 265.112(c) (9-88).

FOURTH, FIFTH, AND SIXTH VIOLATIONS
(Storage of Hazardous Waste Without a Permit and Without Interim Status—Tanks)

39. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 38 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

40. During 1987, Shell, pursuant to an agreement with the Army, constructed three tanks, each with a capacity of approximately 1.33 million gallons, for the purpose of storing hazardous waste pumped from Basin F. The tanks are located northeast of Basin F. A surface impoundment with a capacity of

approximately forty thousand gallons was also constructed adjacent to the tanks and was used in the transfer of Basin F liquid hazardous waste to the tanks.

41. From May 1988 until about mid-September 1988, the Army pumped Basin F liquid hazardous waste from Basin F to trucks, from the trucks to a surface impoundment associated with the tanks, and then into the tanks. Approximately 1 million gallons of liquid were placed in each tank. According to a letter by Don Campbell, Deputy Program Manager, Rocky Mountain Arsenal, dated January 10, 1989, the three tanks were finally topped off with Basin F liquid hazardous waste on or about December 31, 1988.

42. The three tanks currently store a total of approximately 4 million gallons of Basin F liquid hazardous waste. According to the Army's representations during the May 1989 inspection, the Basin F liquid hazardous waste will remain stored in the tanks until completion of treatment and disposal of Basin F liquid hazardous waste, scheduled for 1993.

43. The Basin F Closure Plan required tanks for the interim storage of Basin F hazardous waste and modification to Part A of the Army's RCRA/CHWMA permit application to reflect the tanks.

44. The Army has never applied for nor received a permit or interim status from CDH or the USEPA for the storage of hazardous waste in the tanks.

Conclusions of Law

45. Section 25-15-308(1)(b), C.R.S. (1988 Supp.) states that no person shall "dispose of on-site, treat, or store any hazardous waste without having either

an interim federal status, a federal permit, or a permit granted by the Department pursuant to Section 25-15-303."

46. 6 CCR 1007-3, Section 260.10 defines storage as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste."

47. 6 CCR 1007-3, Section 100.10 states that "any person who treats, stores or disposes of any hazardous waste or wastes identified or listed in Part 261 must apply for a State-issued RCRA permit."

48. The storage of hazardous waste in the three tanks without a permit or interim status from the CDH constitutes three violations of Section 25-15-308(1)(b), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section 100.10.

SEVENTH AND EIGHTH VIOLATIONS

(Storage of Hazardous Waste Without Permit and Without Interim Status—Ponds A and B.)

49. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 48 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

50. During 1988, the Army constructed two surface impoundments referred to as Ponds A and B. Pond A has a capacity of approximately 8.5 million gallons, and Pond B has a capacity of approximately 5 million gallons.

51. Between mid-August and mid-September 1988, the Army pumped approximately 1 million gal-

lons of liquid hazardous waste from Basin F to Pond A.

52. Between mid-July and mid-August 1988, the Army pumped approximately 6.2 million gallons of liquid hazardous waste from Basin F to Pond B. (Hundreds of thousands of gallons of Basin F liquid hazardous waste was lost due to evaporation.)

53. Between mid-August and mid-September 1988, the Army pumped approximately 4.5 million gallons of liquid hazardous waste from Pond B into Pond A.

54. A portion of the Basin F liquid hazardous waste crystallized and remained in Pond B for at least a month following cessation of pumping from Pond B. This waste was ultimately transferred to Pond A.

55. During January 1989, the Army drained between 10,000 and 40,000 gallons of Basin F liquid hazardous waste from Tank No. 2, which had leaked hazardous waste. The drained liquid waste was transferred to Pond A.

56. According to the Weekly Leachate Removal Report, the Army has transferred close to 244,000 gallons of leachate from a 16-acre waste pile situated within Basin F to Pond A. The waste pile contains Basin F hazardous waste. The Army continues to transfer said leachate.

57. At least 5.5 million gallons of Basin F liquid hazardous waste is currently stored in Pond A. According to the Army's representations during the May 1989 inspection, this quantity or more of Basin F liquid hazardous waste will be stored in Pond A until completion of treatment and disposal of Basin F liquid hazardous waste, scheduled for 1993.

58. According to a letter from Don Campbell, dated January 11, 1989 and the O & M Plan, the Army may make future use of Pond B for storage of Basin F liquid hazardous waste during maintenance and repairs of the tanks and/or Pond A.

59. The Army has never applied for nor received a permit or interim status from CDH or the USEPA for the storage of hazardous waste in Ponds A and B.

Conclusions Of Law

60. Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) states that no person shall "dispose of on-site treat, or store any hazardous waste without having either an interim federal status, a federal permit, or a permit granted by the Department pursuant to Section 25-15-303."

61. 6 CCR 1007-3, Section 260.10 defines storage as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste."

62. 6 CCR 1007-3, Section 100.10 states that "any person who treats, stores or disposes of any hazardous waste or wastes identified or listed in Part 261 must apply for a State-issued RCRA permit."

63. The storage of hazardous waste in Ponds A and B without a permit or interim status from CDH constitutes two separate violations of Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section 100.10.

NINTH VIOLATION
(Storage of Hazardous Waste Without a Permit and Without Interim Status—Waste Pile)

64. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 63 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

65. During 1988, the Army constructed a 16-acre waste pile within Basin F. The capacity of the waste pile is approximately 600,000 cubic yards.

66. On or about December 13, 1988, the Army completed placement of approximately 500,000 cubic yards of Basin F soil and debris containing hazardous waste into the waste pile.

67. On or about January 27, 1989, the Army removed soil that was contaminated as a result of a spill from one of the tanks and placed that soil in the waste pile.

68. According to Don Campbell's letter of April 5, 1989, installation of the HDPE liner on the waste pile was completed on or about March 22, 1989, the final clay cap was completed on or about March 23, 1989, and the top soil activity was completed on or about April 5, 1989.

69. According to the Army's representations during the May 1989 inspection, Basin F solid hazardous waste will remain stored in the waste pile until beyond issuance of the CERCLA Record of Decision. According to the Army's June 1, 1989, Primavera Project Planner, the Record of Decision will not be available until August 1993.

70. The Basin F Closure Plan required a waste

pile for the interim storage of Basin F hazardous waste and modification to Part A of the Army's RCRA/CHWMA permit application to reflect the waste pile.

71. The Army has never applied for nor received a permit or interim status from CDH or the USEPA for the storage of hazardous waste in the waste pile.

Conclusions Of Law

72. Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) states that no person shall "dispose of on-site, treat, or store any hazardous waste without having either an interim federal status, a federal permit, or a permit granted by the Department pursuant to Section 25-15-303."

73. 6 CCR 1007-3, Section 260.10 defines storage as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste."

74. 6 CCR 1007-3, Section 100.10 states that "any person who treats, stores or disposes of any hazardous waste or wastes identified or listed in Part 261 must apply for a State-issued RCRA permit."

75. The storage of hazardous waste in the waste pile without a permit and without interim status from CDH constitutes a violation of Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section 100.10 (1-88).

TENTH, ELEVENTH, AND TWELFTH VIOLATIONS
(Failure To Pay Fees)

76. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through

75 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

77. Pursuant to 6 CCR 1007-3, Sections 100.31 and 100.34 (9-85) CDH billed the Army for 1986 annual operating and waste volume fees in the total amount of $11,000. The Army failed and refused to pay any portion of the 1986 annual operating and waste volume fees.

78. Pursuant to 6 CCR 1007-3, Section 100.31 (1-88), CDH billed the Army for 1987 annual fees in the total amount of $5,060.00. The Army failed and refused to pay any portion of the 1987 annual fees.

79. Pursuant to 6 CCR 1007-3, Section 100.31 (1-88), CDH billed the Army for 1988 annual fees in the total amount of $5,060.00. The Army failed and refused to pay any portion of the 1988 annual fees.

80. The Arsenal was used to treat, store and/or dispose of hazardous waste in 1986, 1987, 1988, and is currently so used. Final closure of the Arsenal has not been accomplished or certified.

Conclusions Of Law

81. Pursuant to 6 CCR 1007-3, Sections 100.31 and 100.34 (9-85), all facilities that were operated for the treatment, storage or disposal of hazardous waste were subject to the annual operating and waste volume fees.

82. Pursuant to 6 CCR 1007-3, Section 100.31 (1-88), all facilities that are operated for the treatment, storage or disposal of hazardous waste are subject to the annual fee until final closure is certified.

83. The Army's failure to pay the annual operating and waste volume fees for 1986 constitutes a violation of 6 CCR 1007-3, Sections 100.31 and 100.34 (9-85).

84. The Army's failure to pay the annual fees for the years 1987 and 1988 constitutes two violations of 6 CCR 1007-3, Section 100.31 (9-88).

THIRTEENTH, FOURTEENTH, AND FIFTEENTH VIOLATIONS
(Failure to Properly Respond to a Release from Tank No. 2)

85. The General Findings, Findings of Fact and Conclusions of Law set forth in paragraphs 1 through 84 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

86. According to Don Campbell's letter dated January 10, 1989, Basin F liquid storage Tank No. 2 began leaking Basin F liquid hazardous waste on January 3, 1989. The letter stated that it was believed that the internal liner had failed in part and that Basin F liquid had seeped into the annulus between the liner and the tank wall. Basin F liquid hazardous waste remains in contact with the tank wall.

87. On March 9, 1989, Shell proposed that the Army leave the Basin F liquid in Tank No. 2 and that Shell initiate a program of ultrasonic monitoring of the thickness of the tank wall. The monitoring program examined eight vertical 10 inch strips around the entire tank or approximately 3.5 percent of the area of Tank No. 2.

88. In a letter dated April 17, 1989, from the

United States Department of Justice to the Colorado Department of Law, the Army stated that the leaked Basin F liquid did not go beyond the secondary containment system. The letter indicated that the Army has not removed the liquid from the tank and that pending review of the ultrasonic testing data and related information, it would defer a decision on whether draining of the affected tank is warranted.

89. At a meeting held on May 2, 1989, Shell presented an analysis of the ultrasonic testing which did not disclose the cause of the leak.

90. At the May 2, 1989, meeting, Shell stated that it could not determine the decrease in the life of subject tank until further ultrasonic testing scheduled for September 1989. The tank life may be shortened due to corrosion of the steel resulting from contact of the tank wall with liquid Basin F hazardous waste.

91. By letter dated June 12, 1989, Mr. John Moscato, of the U.S. Department of Justice, informed Ms. Jacqueline Beradini, of the Colorado Department of Law, that the Army would continue to store Basin F liquid in Tank No. 2.

92. The Department of Health was not provided with a report supporting a certification that Tank No. 2 is fit for service.

Conclusions Of Law

93. Pursuant to 6 CCR 1007-3, Section 264.196 (9-88), a tank system or secondary containment system from which there has been a leak or spill must be removed from service immediately.

94. Pursuant to 6 CCR 1007-3, Section 264.196 (a) (9-88), an owner or operator must inspect the tank

system to determine the cause of the release.

95. Because the tanks have secondary containment, the pertinent provisions of 6 CCR 1007-3, Section 264.196 (e) are (1), (2), and (3). These provide:

> (1) Unless the owner/operator satisfies the requirements of paragraphs (e) (2) through (4) of this section, the tank system must be closed in accordance with Section 264.197.
>
> (2) If the cause of the release was a spill that has not damaged the integrity of the system, the owner/operator may return the system to service as soon as the released waste is removed and repairs, if necessary, are made.
>
> (3) If the cause of the release was a leak from the primary tank system into the secondary containment system, the system must be repaired prior to returning the tank system to service.

96. The Army's failure to remove the tank from service immediately after the release or to develop a plan to remove from service as soon as a safe alternative became available constitutes a violation of 6 CCR 1007-3, Section 264.196.

97. The Army's failure to determine the cause of the tank release constitutes a violation of 6 CCR 1007-3, Section 264.196 (a).

98. The Army's failure to repair the cause of the release of hazardous waste from Tank No. 2 into the secondary containment system prior to returning the tank to service constitutes a violation of 6 CCR 1007-3, Section 264.196 (e) (9-88).

SIXTEENTH VIOLATION

(Denial of Access to Records During An Inspection).

99. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 98 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

100. On April 24, 1989, CDH notified the Army by letter that CDH would inspect Basin F and all units containing Basin F hazardous waste commencing on May 1, 1989. CDH further informed the Army that the inspection would include a review of documents required to be maintained on-site pursuant to 6 CCR 1007-3.

101. On the morning of May 1, 1989, CDH orally provided the Army with a preliminary list of documents necessary to continue the inspection. The list included documents required to be maintained at the facility by the Colorado Hazardous Waste Regulations as well as other documents which would evidence compliance with the regulations. Counsel for the Army agreed to provide documents in the afternoon of May 1, 1989.

102. In the afternoon of May 1, 1989, the Army provided Colorado with some of the documents agreed to be provided.

103. In the afternoon of May 1, 1989, counsel for CDH provided the Army with a preliminary written list of documents necessary to continue the inspection. The list included documents required to be maintained at the facility by the Colorado Hazardous Waste Regulations. Counsel for the Army agreed to provide these documents by noon on May 2, 1989.

104. On May 2, 1989, counsel for the Army phoned counsel for CDH, stated that the documents would not be available on May 2, 1989 and requested a 30-day extension of time to provide the documents. Said extension was denied. During a follow-up conversation, counsel for the Army advised counsel for CDH that the contractor's documents were in a truck located on the Arsenal, destined to be relocated in a library (RIC) also situated on the Arsenal. Counsel for CDH requested that a restricted number of documents (including certain documents which were not on the truck) be provided the following day. Counsel for the Army refused to do so and stated that documents would become available as they were microfilmed and reviewed by counsel—the first documents to become available on May 10, 1989.

105. On May 3, 1989, CDH returned to the Arsenal and again requested access to the documents. Counsel for the Army informed CDH that no more documents would be made available until May 10, 1989 and thereafter. A letter dated May 3, 1989, from counsel for the Army to counsel for CDH confirmed this information.

106. On May 10 and 15, 1989, a portion of the documents requested by CDH were made available for review.

107. On May 15, 1989, counsel for the Army informed CDH that many of the requested documents would not be available until the first week of June, if at all.

108. On June 7, 1989, Mr. David Anderson, counsel for the Army, notified Ms. Nettie Rosenthal, counsel for CDH, that supplemental documents were avail-

able for review and that others would later become available.

109. After CDH attempted to make arrangements to review the supplemental documents, Mr. Anderson informed Ms. Rosenthal on June 12, 1989, that the documents would not be available for review until June 19, 1989—fully a month and a half after commencement of inspection.

110. On June 20, 1989, Colorado received copies of some of the documents requested during the inspection and copies of the supplemental documents.

111. Among the documents initially requested on May 1, 1989, were all operating logs for Basin F from November 1980 until the present.

112. On May 1, 1989, Mr. Anderson assured representatives of CDH that these operating logs could be provided.

113. On May 15, 1989, Mr. Anderson informed representatives of CDH that Basin F operating logs from November 1980 through commencement of the Army's interim action were located in Washington DC and would not be available for review.

114. Among other records, the Department of Health has not yet been provided with the Basin F operating logs from November 1980 through commencement of the Army's Basin F interim action.

Conclusions Of Law

115. Section 25-15-301 (3), C.R.S. (1988 Supp.) provides:

> "The department, by its duly authorized representatives, shall have the powers to enter and inspect any property, premises or place in which hazardous waste is reasonably believed to be

located for the purpose of determining the compliance or noncompliance with any provisions of this part 3, any order or permit, or term or condition thereof, issued pursuant to this part 3 . . . "

116. 6 CCR 1007-3, Sections 264.74 and 265.74 (5-87) require:

"All records, including plans, required under this part must be furnished upon request, and made available at all reasonable times for inspection, by any officer, employee, or representative of CDH who is duly designated by the Director."

117. 6 CCR 1007-3, Parts 264 and 265 require that certain documents be maintained at the facility. These documents include, but are not limited to: waste analysis plan [Sections 264.13 (b) and 265.13 (b)]; inspection schedule and plan [Sections 264.15 (d) and 265.15 (d)]; inspection logs and summaries [Sections 2674.15 (d) and 265.15 (d)]; records of job titles, job descriptions, employees and employee training [Sections 264.16 (d) and 265.16 (d)]; contingency plan [Sections 264.53 and 265.53]; operating records [Sections 264.73 and 265.73]; and unapproved closure plans [Section 265.112].

118. The Army's failure, on May 1 through May 23, 1989, to provide a waste analysis plan, all inspection shedules and plans, all inspection logs and summaries, all records of job titles, job descriptions, employees, and employee training, all operating records, and all unapproved closure plans constitutes violations of Section 25-15-301 (3), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section, [sic] 264.74 and 265.74 (5-87).

SEVENTEENTH THROUGH TWENTY-EIGHTH VIOLATIONS
(Failure to Perform Adequate Inspections of Basin F Tanks).

119. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 118 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

120. Basin F liquid hazardous waste was first placed in the tanks on or about May 26, 1988.

121. Each of the three Basin F hazardous waste storage tanks is equipped with two leak detection systems. These consist of a leak detection system for the double steel bottom and a leak detection system for the internal liner. There are eight nozzles around the bottom of each tank for detection of any leakage through the internal liner.

122. According to Mr. Edwin Berry, the Army did not check the leak detection valves of any of the tanks until after the leak from Tank No. 2 was discovered. This inspection occurred on or about January 3, 1989.

123. On May 17, 1989, Mr. Berry indicated that the leak detection valves of Tank Nos. 1 and 3 had not been checked since the inspection which had occurred on or about January 3, 1989.

124. The Basin F Monthly Summary Tank Farm Management report, the only document submitted by the Army regarding inspection of leak detection valves, indicates that regular inspection of the leak detection valves on Tank Nos. 1 and 3 did not commence until July 1989.

125. The Army did not provide documents evi-

dencing any type of inspection of the tanks for the period from when the Army first placed liquid Basin F hazardous waste into the tanks until June 13, 1989.

126. The Army did not provide documents evidencing daily inspections of aboveground portions of the tanks for dates prior to May 1, 1989.

127. Many of the documents provided as inspection documents did not indicate inspections to detect corrosion or releases, data from monitoring and leak detection equipment, and inspections of the area immediately surrounding the externally accessible portion of the tank system to detect erosion or signs of releases of hazardous waste.

128. None of the inspection logs contain evidence of inspection of the leak detection ports on a regular basis.

129. The inspection logs from June 13, 1988 until September 27, 1988, provide only tank level readings.

130. Each of the three Basin F hazardous waste storage tanks is equipped with two cathodic protection systems.

131. The Army did not provide documents of evidencing passing inspections of the cathodic protection systems for inspections required six months after initial installation and annually thereafter.

132. The Army did not provide documents evidencing passing inspections of all sources of impressed current on a bimonthly basis for the time period during which the tanks contain Basin F hazardous waste.

133. By letter dated May 31, 1989, John Moscato, counsel for the Army, informed Jacqueline Berardini,

counsel for CDH, that: on May 19, 1989 a small drip was discovered on one of the valves of Tank No. 3; that on May 25, 1989, liquid samples were taken from all valves on Tank Nos. 1 and 3; and analyses of the samples revealed the presence of Basin F-related compounds.

134. According to the Basin F Tank Farm Progress Report to PMRMA, dated June 26, 1989 and the only Basin F Monthly Summary Tank Farm Management report, certain valves on Tank No. 3 had any measurable fluid. These valves detect the presence of liquids in between the internal liners and the tank walls.

Conclusions Of Law

135. 6 CCR 1007-3, Section 264.15 (a) provides:

> (a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to—(1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

136. 6 CCR 1007-3, Section 264.15 (b) provides, in part:

> (b) (1) The owner or operator must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or

responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of possible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction of any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.

137. 6 CCR 1007-3 Section 264.15 (d) provides:

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector, a notation of the observations made, and the date and nature of any repairs or other remedial actions.

138. 6 CCR-3 Section 294.195 (b) provides, in part:

(b) The owner and operator must inspect at least once each operating day:

(1) Aboveground portions of the tank system, if any, to detect corrosion or releases of waste;

(2) Data gathered from monitoring and leak

detection equipment (e.g., pressure or temperature gauges, monitoring wells) to ensure that the tank system is being operated according to its design; and

(3) The construction materials and the area immediately surrounding the externally accessible portion of the tank system, including the secondary containment system (e.g., dikes) to detect erosion or signs of releases of hazardous waste (e.g., wet spots, dead vegetation).

139. 6 CCR 1007-3 Section 294.195 (c) provides, in part:

(c) The owner or operator must inspect cathodic protection systems, if present, according to, at a minimum, the following schedule to ensure that they are functioning properly:

(1) The proper operation of the cathodic protection system must be confirmed within six months after initial installation and annually thereafter, and

(2) All sources of impressed current must be inspected and/or tested as appropriate, at least bimonthly (i.e., every other month).

140. The Army performed inadequate routine inspections of the tanks. The Army's failure to inspect for all items required by 6 CCR 1007-3, Sections 264.15 (a) & (b) and 264.195 (b) constitute violations of 6 CCR 1007-3, Sections 264.15 and 264.195 for each tank.

141. Failure by the Army to inspect the proper operation of the cathodic protection systems as required and to inspect the source of impressed current on a bimonthly basis for each of the three Basin F

hazardous waste storage tanks constitutes a separate violation of 6 CCR 1007.3, Section 264.195 (c) for each tank.

142. The Army's failure to develop written inspection schedules from the time the tanks first received hazardous waste constitutes a separate violation of 6 CCR 1007-3, Section 264.15 (b) for each tank.

143. The Army's failure to keep inspection logs from the time the tanks received hazardous waste constitutes a separate violation of 6 CCR 1007-3, Section 264.15 (d) for each tank.

TWENTY-NINTH THROUGH THIRTY-FIRST VIOLATIONS
(Failure to Perform Adequate Inspections of the Basin F Waste Pile)

144. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 143 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

145. Hazardous waste was first placed on the double lined waste pile on or about October 11, 1988.

146. On May 1, 1989, CDH inspectors requested copies of all written schedules and logs for all inspections conducted to identify malfunctions and deteriorations of the Basin F waste pile.

147. On May 15, 1989, Robert Pitts, of Acumenics, a company that provides support to the Department of Justice, stated that all inspections of the waste pile prior to April 29, 1989, would be documented in the Basin F daily Health and Safety logs or in the Basin

F Quality Assurance/Quality Control ("QA/QC") logs.

148. The inspectors determined that the Basin F daily Health and Safety logs and the Basin F QA/QC logs did not contain records of weekly inspections of the waste pile to detect evidence of the following: deterioration, malfunctions or improper operation of run-on and run-off control systems; the presence of liquid in the leak detection system; proper functioning of wind dispersal control systems; presence of liquid in the leachate collection; and proper functioning of the leachate collection and removal systems. Such weekly inspections did not commence until May 8, 1989.

Conclusions Of Law

149. 6 CCR 1007-3, Section 264.15 (a) provides:

> (a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to—(1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

150. 6 CCR 1007-3 Section 264.15 (b) provides, in part:

> (b) (1) The owner or operator must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or

responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of possible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction of any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.

151. 6 CCR 1007-3 Section 264.15 (d) provides:

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector, a notation of the observations made, and the date and nature of any repairs or other remedial actions.

152. 6 CCR 1007-3 Section 264.254 (b) (9-85) provides:

(b) While a waste pile is in operation, it must be inspected weekly and after storms to detect evidence of the following:

(1) Deterioration, malfunctions, or improper operation of run-on and run-off control systems;

(2) The presence of liquids in leak detection systems, where installed to comply with section 264.252;

(3) Proper functioning of wind dispersal control systems, where present; and

(4) The presence of leachate in and proper functioning of leachate collection and removal systems, where present.

153. The Army performed inadequate inspections of the waste pile. The Army's failure to perform weekly inspections of the waste pile that included the items required by 6 CCR 1007-3, Sections 264.15 (a), 264.15 (b), and 264.254 (b) constitutes violations of the cited sections.

154. Prior to May 8, 1989 the Army failed to develop a written schedule for inspection of the waste pile. Such failure constitutes a violation of 6 CCR 1007-3, Section 264.15 (b).

155. The Army's failure to keep inspection logs from the time the waste pile received hazardous waste constitutes a violation of 6 CCR 1007-3, Section 264.15 (d).

THIRTY-SECOND THROUGH THIRTY-FOURTH VIOLATIONS
(Failure to Perform Inspections of Basin F)

156. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 155 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

157. Large quantities of soil contaminated with Basin F hazardous waste remain stored in Basin F.

158. Basin F has never been closed pursuant to CHWMA and therefore, remains an active storage facility.

159. During December 1988 through spring 1989, Basin F was covered with a layer of clay soil and a layer of top soil and was seeded.

160. The Army did not provide inspection plans, schedules or logs pertaining to Basin F during the time period that Basin F contained liquid hazardous waste.

161. The Army did not provide inspection plans, schedules or logs pertaining to Basin F for the time period since Basin F was covered until May 12, 1989.

Conclusions Of Law

162. 6 CCR 1007-3, Section 265.15 (a) provides:

> (a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to— (1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

163. 6 CCR 1007-3 Section 2675.15 (b) provides, in part:

> (b) (1) The owner or operator must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equip-

ment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of posssible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction of any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.

164. 6 CCR 1007-3 Section 265.15 (d) provides:

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector,a notation of the observations made, and the date and nature of any repairs or other remedial actions.

165. The Army's failure to provide inspection plans, schedules or logs involving Basin F is interpreted to mean that such plans, schedules, or logs do not exist and that inspections did not occur.

166. The Army's failure to inspect Basin F prior to removal of the liquid hazardous waste from the basin constitutes a violation of 6 CCR 1007-3, Section 265.15 (a).

167. The Army's failure to inspect Basin F since the installation of the cover and prior to May 12, 1988 constitutes a violation of 6 CCR 1007-3, Section 265.15 (a).

168. The Army's failure to develop an inspection schedule which covers Basin F prior to removal of the liquid hazardous waste from the basin constitutes a violation of 6 CCR 1007-3, Section 265.15 (b).

169. The Army's failure to develop an inspection schedule which covers Basin F since the installation of the cover and prior to May 12, 1989 constitutes a violation of 6 CCR 1007-3, Section 265.15 (b).

170. The Army's failure to keep inspection logs regarding Basin F prior to removal of the liquid hazardous waste from the basin constitutes a violation of 6 CCR 1007-3, Section 265.15 (d).

171. The Army's failure to keep inspection logs regarding Basin F since the installation of the cover and prior to May 12, 1989 constitutes a violation of 6 CCR 1007-3, Section 265.15 (d).

THIRTY-FIFTH THROUGH THIRTY-SEVENTH VIOLATIONS
(Failure to Notify of Leaks—
Pond A, Pond B, and the Waste Pile)

172. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 171 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

173. On May 1, 17, and 22, 1989, CDH inspectors were told by Mr. Edwin Berry and on May 22 and 25 by Mr. Don Campbell, Deputy Program Manager of the Rocky Mountain Arsenal, that liquids had been discovered in the leak detection systems of Pond A, Pond B, and the waste pile since at least October 1988.

174. According to Messrs. Berry and Campbell during the May 1989 inspection, liquids from at least one leak detection system were pumped into Pond A since October 1988.

175. According to a Contaminated Liquid Removal Daily Report dated August 18, 1988, approximately 350 gallons of liquid was pumped from the Pond A sump and the liquid appeared to be similar to Basin F liquid.

176. According to a Contaminated Liquid Removal Daily Report dated August 18, 1988, approximately 1000 gallons of liquid was pumped from the Pond B sump and the liquid initially appeared to be similar to Basin F liquid.

177. According to Messrs. Berry and Campbell, prior to May 24, 1989, no analyses were performed on liquids found in the leak detection systems of Pond A, Pond B, and the waste pile nor on the liquids transferred from the leak detection systems to Pond A. Prior to May 24, 1989, both Messrs. Berry and Campbell, indicated their belief that the liquids in each of the leak detection systems for Pond A, Pond B, and the waste pile were condensate because the men claimed that the liquid was almost clear and did not smell like Basin F liquids.

178. On May 23, 1989, Army contractors

(EBASCO) took samples of liquid from the leak detection systems of Pond A, Pond B, and the waste pile at the request of CDH and in the presence of representatives of CDH. Duplicates and/or splits of the samples were provided to the Army in the Army's bottles.

179. While the samples were being taken, CDH representatives noted that the samples taken from the Pond A leak detection system were dark black/brown in color and were more viscous than water. Jed Lowrey of EBASCO, who was taking the samples, stated that the samples smelled like Basin F.

180. While samples were being taken, CDH representatives noted that the samples taken from the Pond B leak detection system had a brown taint and smelled like Basin F hazardous waste.

181. While samples were being taken, CDH representatives noted that the samples taken from the waste pile cell no. 3 leak detection system and the cell no. 3 leachate collection system had a brown taint and smelled of Basin F hazardous waste.

182. On May 25, 1989, Mr. Campbell called a meeting to discuss the Army's preliminary results of analyses of samples collected on May 23, 1989 from the leak detection systems of Pond A, Pond B, and the waste pile.

183. The May 25, 1989 meeting included Mr. Campbell; Messrs. David Anderson and John Moscato of the U.S. Department of Justice; Messrs. Connally Mears, William Clemens and Ms. Linda Grimes of the U.S. EPA; Ms. Vicky Peters of the Colorado Department of Law; and Mr. Jeff Edson of CDH.

184. According to Mr. Campbell, the Army's qualitative analytical results indicated the presence of Basin F constituents in each of the samples from the

leak detection systems. The primary constituents identified were sulfur compounds and dimethyl methylphosphonate.

185. The CDH lab confirmed the results found by the Army and preliminarily identified the presence of DBCP.

186. Mr. Campbell also stated that the liquids in the leak detection systems were pumped into Pond A on May 24, 1989.

187. According to Mr. Campbell, no measurements were made of the volumes of liquids removed from each leak detection sump although CDH requested those measurements prior to the pumping. Mr. Campbell further stated that elevations of liquids in the sumps were measured but that these measurements had not been converted to volume measurements.

188. According to a Request for and Results of Tests dated July 5, 1989, samples taken from the Pond A sump on or about June 29, 1989 contain 57.3 mg/l of DMMP and 53.7 mg/l of P-CPMSO.

189. According to Table 2 of Basin F Ponds A and B Progress Report to PMRMA dated June 26, 1989, the liquids stored in Pond A contain 11.6 mg/l of DMMP and 39.2 mg/l of p-CPM sulfone.

190. According to the Basin F Ponds A and B Progress Report to PMRMA dated June 26, 1989, the contractor did not attempt to pump the Pond A sump until May 26, 1989 but could not do so, in part, because the high concentration of salts in the liquid caused crystallization to occur in the pump.

191. According to the Weekly Leachate Removal Report, for the dates April 27, 1989 through June 24, 1989, thousands of gallons of liquid were removed

from the waste pile leak detection and leachate collection systems on a daily basis.

192. Given the fact that liquid containing Basin F hazardous waste constituents was found in the leak detection system of Pond A, CDH must conclude that Basin F hazardous waste is leaking through the primary Pond A liner into the leak detection system.

193. Given the fact that liquid containing Basin F hazardous waste constituents was found in the leak detection system of Pond B, CDH must conclude that Basin F hazardous waste leaked through the Pond B primary liner into the leak detection system during the period that Basin F hazardous waste was present in Pond B.

194. Given the fact that liquid containing Basin F hazardous waste constituents was found in cell no. 3 of the leak detection system of the waste pile, CDH must conclude that Basin F hazardous waste is leaking through the waste pile primary liner into the leak detection system.

195. The Army did not provide written notification to CDH within seven days of detecting liquids in the leak detection systems of Pond A, Pond B, and the waste pile.

Conclusions Of Law

196. Regarding surface impoundments, 6 CCR 1007-3, Section 264.222 (b) (1) (9-85) provides:

> (b) If liquid leaks into the leak detection system, the owner or operator must:
>
> (1) Notify the Department of the leak in writing within seven days after detecting the leak; ...

197. Regarding waste piles, 6 CCR 1007-3, Section 264.252 (b) (1) (9-85) provides:

> (b) If the liquid leaks into the leak detection system, the owner or operator must:
>
> (1) Notify the Department of the leak in writing within seven days after detecting the leak; . . .

198. The Army's failure to provide written notification to CDH within seven days of the detection of liquids in the leak detection systems of Pond A and Pond B constitutes two separate violations of 6 CCR 1007-3, Section 264.222 (b) (9-85).

199. The Army's failure to provide written notification to CDH within seven days of the detection of liquids in the leak detection system of the waste pile constitutes a violation of 6 CCR 1007-3; Section 264.252 (b) (9-85).

THIRTY-EIGHTH AND THIRTY-NINTH VIOLATIONS

(Failure to Remedy Deterioration and Malfunction of the Liners of the Leak Detection Systems for Pond A and the Waste Pile)

200. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 199 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

201. At the commencement of the May 1989 RCRA/CHWMA inspection, the Army had not implemented a program to remedy the deterioration or malfunction of the liners for Pond A despite knowing that liquids were in the systems since August 1988.

202. At the commencement of the May 1989 RCRA/

CHWMA inspection, the Army had not implemented a program to remedy the deterioration or malfunction of the liners for the waste pile despite knowing that liquids were in the systems since October 1988.

203. To date, the Army has not notified CDH of a program designed to remedy any deterioration or malfunction of the liners for Pond A and the Waste Pile.

Conclusions Of Law

204. 6 CCR 1007-3, Section 264.15 (c) (9-85) provides:

> (c) The owner or operator must remedy any deterioration or malfunction of equipment or structures which the inspection reveals on a schedule which ensures that the problem does not lead to an environmental or human health hazard. Where a hazard is imminent or has already occurred, remedial action must be taken immediately.

205. The Army's failure to implement a program to remedy the deterioration or malfunction of the liners for Pond A and the Waste Pile does not ensure that the problem does not lead to an environmental or health hazard and constitutes three separate violations of 6 CCR 1007-3, Section 264.15 (c) (9-85).

FORTIETH VIOLATION

(Failure to Have a Current Contingency Plan)

206. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 205 of this Final Compliance Order are incorporated by reference as though fully set forth below.

Findings Of Fact

207. On May 1, 1989 CDH representatives requested a copy of the contingency plan then applicable to the Arsenal including the Basin F hazardous waste management units. On that day, Mr. Strang of the Program Manager's Office provided CDH with copies of the January 1989 Spill Prevention Control and Countermeasure Plan (1989 SPCC), the January 1989 Installation Spill Contingency Plan (1989 ISCP), and the March 1, 1989 Emergency Notification Plan.

208. CDH later questioned whether the 1989 SPCC and 1989 ISCP were currently in effect and representatives of the Army indicated that these were draft plans.

209. The March 1, 1989 Emergency Notification Plan addresses only notification procedures and does not address emergency actions, arrangements agreed to with local response authorities, emergency equipment, emergency coordinators, and an evacuation plan for the facility.

210. On May 15, 1989, the Army provided for review additional plans purported to be "health and safety" plans. These were the 1984 SPCC, the April 1988 SHERP, Weekly Safety Reports 1 through 58, and the EBASCO Environmental Protection Plan.

211. On June 20, 1989, the Department of Justice delivered to the Colorado Attorney General's Office nine plans under the heading of "Emergency Plans."

212. On July 7, 1989, the Army delivered to CDH an O & M Plan which contained a draft document labeled "Contingency Plan for the Basin F Interim Response Action Structures Complex." This plan references numerous other emergency-related plans,

including but not limited to some of the plans submitted on June 20, 1989.

213. CDH asked on numerous occasions, in writing and orally, when each plan was or is in effect. To date, the Army has not provided a response.

214. The Army has not provided CDH a contingency plan which it claims to be currently in effect at the Arsenal which includes the Basin F hazardous waste management units.

Conclusions Of Law

215. 6 CCR 1007-3, Section 264.51 (10-87) provides, in part:

> (a) Each owner or operator must have a contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste constituents to air, soil, surface or ground water.

216. The failure of the Army to have a contingency plan currently applicable at the Arsenal which covers the Basin F hazardous waste management units constitutes a violation of 6 CCR 1007-3, Section 264.51 (10-87).

FORTY-FIRST VIOLATION

(Failure to Submit Copies of a Contingency Plan to All Local Authorities)

217. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 216 of this Final Compliance Order are incorporated by reference as though fully set forth below.

Findings Of Fact

218. On May 1, 1989 and thereafter, CDH representatives have requested documentation evidencing submittal of a contingency plan to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services. To date, the Army has provided no such documentation.

219. On June 13 and 14, 1989 the following local authorities informed CDH that they had no copies of a contingency plan for the Arsenal: Brighton Fire Department; Commerce City Police Department; and Tri-County Health Department. CDH does not have a copy of the Arsenal's current contingency plan, if any exists. Fitzsimmons Medical Hospital informed CDH that it has a copy of the draft 1989 SPCC.

Conclusions of Law

220. 6 CCR 1007-3, Section 264.53 (b) provides:

> A copy of the contingency plan and all revisions to the plan must be:
> (b) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency service.

221. The Army's failure to submit a copy of a contingency plan to all local authorities that may be called upon to provide emergency services constitutes a violation of 6 CCR 1007-3, Section 264.53 (10-87).

FORTY-SECOND VIOLATION

(Failure to Maintain Adequate Operating Records)

222. The General Findings, Findings of Fact, and

Conclusions of Law set forth in paragraphs 1 through 221 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

223. On May 1, 1989, inspectors for CDH requested all operating logs for Pond A, Pond B, the waste pile, and the three tanks.

224. On May 2, 1989, Mr. Berry provided representatives of CDH with a "Liquid Transfer Log" (LTL) and represented that this was part of the operating record. The LTL recorded the transfer of Basin F liquids from Basin F to the three hazardous waste storage tanks, Pond B, and Pond A, and from Pond B to Pond A.

225. The operating records presented by Mr. Berry on May 1, 1989, were not current; they were limited to hazardous waste transfer and storage from May 26, 1988 to September 25, 1988.

226. On May 1, 1989, Mr. Berry stated that leachate from the waste pile had been transferred to Pond A since September 25, 1988 and that liquids from the leak detection system of Pond A were pumped into Pond A.

227. On May 15, 1989, Mr. Berry stated that Basin F liquids from the Tank No. 2 spill and from drainage of Tank No. 2 were transferred to Pond A.

228. The operating records provided during the May 1989 RCRA/CHWMA inspection did not include a description and the quantity of each hazardous waste received, and the methods, dates, quantities and locations of its storage or transfers including but not limited to transfers from: the leachate collection system of the waste pile; the leak detection systems;

the Tank No. 2 spill; the decontamination of Pond B, the decontamination of equipment, and the decontamination of the tank farm secondary containment. Only a portion of this information was provided in documents delivered by the Department of Justice to the Colorado Attorney General's Office on June 20, 1989.

Conclusions Of Law

229. 6 CCR 1007-3, Section 264.73 (b) (9-88) provides, in part:

> (b) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:
> (1) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or disposal at the facility as required by Appendix I;
> (2) The location of each hazardous waste at the facility and the quantity at each location....

230. The Army's failure to include the methods and dates of transfer and the location, quantities, and dates of storage of hazardous waste transferred from: the leachate collection system of the waste pile; the leak detection systems; the Tank No. 2 spill; the decontamination of Pond B, the decontamination of equipment, and the decontamination of the tank farm secondary containments constitutes a violation of 6 CCR 1007-3, Section 264.73 (b) (9-88).

ORDER

231. Based on the foregoing General Findings, Findings of Fact and Conclusions of Law, and pursuant to Section 25-15-308, C.R.S. (1982 & 1988 Supp.),

the Army is hereby ordered to comply with the following:

232. Pursuant to 6 CCR 1007-3, Section 265.112 (c) (4) (7-89), the Army shall submit an amended Basin F closure Plan ("Amended Basin F Closure Plan") to CDH within 60 days from the effective date of this Amended Compliance Order for CDH's review and approval. The Amended Basin F Closure Plan shall comply with all requirements of 6 CCR 1007-3, part 265, subpart G. To the extent not precluded by changed factual circumstances, the Amended Basin F Closure Plan shall be consistent with the terms and requirements contained in the October 1, 1986, Basin F Closure Plan. The Amended Basin F Closure Plan shall include but not be limited to, provisions for the following:

a. summary construction reports for the previous excavation and relocation of all hazardous wastes from Basin F, to the new RCRA/CHWMA units, i.e., the storage tanks, Pond A, Pond B, and the Basin F waste pile, if not previously provided pursuant to RCRA/CHWMA inspection;

b. an estimated volume of contaminated materials removed, if not previously provided pursuant to the RCRA/CHWMA inspection;

c. an evaluation of the data collected showing the extent of contaminants in soils beneath Basin F;

d. the volume and nature of materials placed in and the current volume and nature of materials contained in each of the above-mentioned new RCRA/CHWMA units;

e. a work plan to complete the evaluation of the nature and extent of soils contamination re-

maining in Basin F (not including the wastes in the waste pile);

f. proposed soil performance standards to be used to define the extent of residual contamination that would allow final closure of Basin F pursuant to 6 CCR 1007-3, Section 265.228 (a) (1) (9-88);

g. a proposed schedule for submittal of a work plan for remediation of soils remaining in Basin F to meet soil performance standards or closure as a landfill pursuant to 6 CCR 1007-3, Section 265.228 (a) (2) (9-88).

h. proposed schedule for submittal of work plans for final treatment/disposal of all Basin F liquid and solid hazardous wastes, such work plan shall provide for treatment/disposal of all wastes currently contained in the storage tanks, Pond A, and the waste pile as soon as technically feasible;

i. proposed schedule for submittal of closure plans for the closure of the storage tanks, Pond A, Pond B, and the waste pile and all other units containing Basin F hazardous wastes;

j. work plan for mitigation, monitoring, and control measures with respect to air emissions from all hazardous waste management units containing Basin F hazardous wastes, including vent controls on the tanks, Ponds A & B, and the waste pile, or in the alternative, data acceptable to CDH that these units are not emitting hazardous waste into the air; adequate on-post and off-post air monitoring; adequate worker protection measures; contingency plans for on-post and off-post human exposure to airborne hazardous

waste; and reduction of work areas and/or use of odor suppressants within Basin F in order to minimize air emissions when further cleanup work in Basin F is performed;

k. a work plan detailing an inspection and maintenance program for all hazardous waste management units containing Basin F hazardous wastes which is designed to ensure sufficient identification of problems in time to correct them before they can harm human health or the environment, and which complies with the inspection and monitoring requirements of 6 CCR 1007-3;

l. a work plan detailing additional ground water investigations with respect to the adequacy and proper siting of the Basin F Ground Water Intercept and Treatment System including, but not limited to, a complete evaluation of:

1) ground water contamination immediately downgradient of Basin F including the Denver formation and any additional plumes moving in a northwest direction;

2) ground water direction and flow rate immediately downgradient of Basin F and upgradient of the Rocky Mountain Arsenal northern boundary to identify all suitable locations for the Basin F Ground Water Intercept and Treatment System; and

3) the technical practicability of including the Upper Denver Aquifer in the Basin F Ground Water Intercept and Treatment System;

m. a work plan detailing the means and schedule for pumping out the leak detection systems of

Pond A, Pond B, and the waste pile and draining the liquids between the tank liners and tank walls; and

n. a work plan detailing the means for determining the cause of the presence of liquids containing Basin F hazardous waste constituents in the leak detection systems of Pond A, Pond B, the waste pile, and the presence of such liquids in the space between the interior liner and tank wall of the Basin F storage tanks.

233. The Army shall submit, as part of the Amended Basin F Closure Plan, schedules for submittal of work plans and closure plans.

234. The Army shall submit work plans and closure plans (and post-closure plans if determined necessary by CDH) for each unit containing Basin F hazardous waste pursuant to the schedules provided in the Amended Basin F Closure Plan and this Revised Order.

235. CDH shall review the work plans, closure plans, and post-closure plans and inform the Army in writing of its approval or disapproval of the work plans, closure plans, post-closure plans, or any part thereof. In the event of any disapproval, the written notice shall specify the reasons and any required modifications. The Army shall modify the work plans, closure plans, or post-closure plans to address CDH comments and submit the modified work plans to CDH within 15 days, the modified closure plans to CDH within 30 days, or the modified post-closure plans within 60 days of the date the Army receives CDH's notice.

236. The work plan for each phase or closure plan or post-closure plan for each unit containing Basin F

hazardous waste, once approved by CDH, will become a part of this Final Compliance Order.

237. The Army shall not implement any work plan, closure plan, or post-closure plan prior to approval by CDH.

238. The Army shall submit a complete report at the completion of work performed pursuant to an approved work plan, closure plan, or post-closure plan.

239. Within 30 days of the effective date of this Final Compliance Order the Army shall submit to CDH for review a contingency plan for the Arsenal which includes all hazardous waste management units containing Basin F hazardous wastes. The contingency plan shall fulfill the purpose defined in 6 CCR 1007-3 Sections, 264.51 and 265.51. Thus, the contingency plan shall be designed to minimize hazards to human health and the environment from fires, explosions, or any unplanned release of hazardous wastes to air, soil, surface water, or ground water. The contingency plan shall provide for immediate implementation in the event of a fire, explosion, or release of hazardous waste from all hazardous waste management units, including those units containing Basin F hazardous wastes, which could threaten human health or the environment.

240. The content of the contingency plan shall meet the requirements of 6 CCR 1007-3, Sections 264.52 and 265.52. Thus, the contingency plan shall include provisions for notification of local emergency response authorities, State and County health departments, and the State Division of Disaster and Emergency Services in the event that the facility has a release, fire, or explosion that could threaten hu-

man health or the environment outside the facility. For the purposes of the contingency plan, any catastrophic failure of any of the three Basin F hazardous waste storage tanks shall be deemed an event that threatens human health or the environment outside the facility. The plan shall provide for development with local and state agencies of off-site evacuation plans and response plans.

241. Review and resubmittal of the contingency plan shall be treated as for a work plan.

242. The contingency plan, once approved by CDH, shall become part of the Amended Basin F Closure Plan and a part of this Final Compliance Order.

243. Within 30 days of the effective date of this Final Compliance Order, the Army shall submit a work plan detailing the inspection plan of all hazardous waste management units containing Basin F hazardous waste, including Basin F. The inspection plan must meet all of the requirements of 6 CCR 1007-3, Sections 264.15, 264.195, 264.226, and 264.254. The results of the inspections shall be reported to CDH monthly.

244. The portion of the inspection plan addressing Basin F must include an operation and maintenance schedule which shall:

(a) Maintain the integrity and effectiveness of the soil cover including making repairs to the cover as necessary to correct the effects of settling, subsidence, erosion, or other events;

(b) Maintain and monitor the ground water monitoring system; and

(c) Prevent run-on and run-off from eroding or otherwise damaging the Basin F cover.

245. The portion of the inspection plan addressing the three tanks containing Basin F hazardous waste must meet the requirements of 6 CCR 1007-3, Section 264.195 (7-89). Pursuant to 6 CCR 1007-3, Section 264.15(b) (7-89), this portion of the inspection plan shall take into account the corrosion of the tanks' walls due to contact of the tank walls with liquids containing Basin F hazardous waste constituents. Thus, details of inspection plans for corrosion of the tank walls (*i.e.*, ultrasonic testing) shall be provided.

246. The portion of the inspection plan addressing Pond A and Pond B must meet the requirements of 6 CCR 1007-3, Section 264.226(b) (9-85). Pursuant to 6 CCR 1007-3, Section 264.15(b) (7-89), this portion of the inspection plan shall take into account the possible deterioration or malfunction of the liners. Thus, inspection measures additional to those required in section 264.226(b) may be necessary.

247. The portion of the inspection plan addressing the Basin F waste pile must meet the requirements of 6 CCR 1007-3, Section 264.254(b) (9-85). Pursuant to 6 CCR 1007-3, Section 264.15(b) (7-89), this portion of the inspection plan shall take into account the possible deterioration or malfunction of the liners. Thus, inspection measures additional to those required in section 264.254(b) may be necessary.

248. The inspection plan, once approved by CDH, shall become part of the Amended Basin F Closure Plan and a part of this Final Compliance Order.

249. On the effective date of this Final Compliance Order, the Army shall submit to CDH for approval a work plan for pumping out the leak detec-

tion systems of Pond A, Pond B, and the waste pile and draining the liquids between the tank liners and tank walls. The amounts and dates of liquids pumped or drained shall be reported to CDH monthly.

250. The work plan for pumping out the leak detections systems, once approved by CDH, shall become part of the Amended Basin F Closure Plan and this Final Compliance Order.

251. Within 30 days of the effective date of this Final Compliance Order, the Army must submit to CDH, for approval, a work plan for determining the cause of the presence of liquids containing Basin F hazardous waste constituents in the leak detection systems of Pond A, Pond B, the waste pile, and the presence of such liquids in the space between the interior liner and tank wall of the three Basin F storage tanks.

252. The work plan for determining the cause of the presence of liquids in leak detection systems and the space between the tank liners and tank walls, once approved by CDH, shall become part of the Amended Closure Plan and this Final Compliance Order.

253. The Army shall pay all document review fees for: the Amended Basin F Closure Plan required pursuant to this Final Compliance Order; all other plans submitted pursuant to the Amended Basin F Closure Plan; and any post-closure plan required by CDH, consistent with 6 CCR 1007-3, Section 100.32 (1-88).

254. Within 60 days of the effective date of this Final Compliance Order, the Army shall pay in full all unpaid annual operating fees, waste volume fees,

and annual fees for which the Arsenal previously has been billed.

255. Within 10 days of the effective date of this Final Compliance Order, the Army shall submit a revised Part A permit application to CDH which includes all units currently containing Basin F hazardous waste. The Army shall subsequently amend the Part A permit application, as appropriate, in order to include any additional units which treat, store, or dispose of Basin F hazardous waste.

256. On the effective date of this Final Compliance Order the Army shall provide, to the extent not previously provided pursuant to or subsequent to the May 1989 RCRA/CHWMA inspection, all of the following:

a. all final as-built drawings of the three Basin F tanks, Pond A and Pond B, and the waste pile.

b. all construction specifications and plans for the three Basin F tanks, Pond A, Pond B, the waste pile.

c. all logs containing levels in the sumps for the leak detection systems and leachate collection systems for Pond A, Pond B, and the waste pile from the date hazardous waste was placed in each unit until the effective date of this Final Compliance Order.

d. all logs which contain information regarding the dates and/or amounts pumped from the leak detection systems and leachate collection systems for Pond A, Pond B, and the waste pile from the date hazardous waste was placed in each unit until the effective date of this Final Compliance Order.

e. all logs which contain information regarding the dates and/or amounts removed from the space between the interior tank liner and the tank wall for the Basin F tanks.

f. all data regarding the analysis of liquids pumped from the leak detection systems and leachate collection systems for Pond A, Pond B, and the waste pile from the date Basin F hazardous waste was placed in each unit until the effective date of this Final Compliance Order.

g. all data regarding the analysis of liquids removed from the space between the interior tank liner and the tank wall for the Basin F tanks from the date hazardous waste was placed in each tank until the effective date of this Final Compliance Order.

h. all documents relating to the testing of the three tanks' walls since the release from Tank No. 2.

i. all contingency plans which cover Pond A, Pond B, the tanks, and the waste pile and which are currently in effect, if any and state the dates that each contingency plan was effective.

j. the Army has claimed throughout the RCRA/CHWMA inspection that the Army has inspected the leak detection and leachate collection systems pursuant to an "O & M Plan." A copy of this plan is required.

k. ground water monitoring data and plans which are used to indicate whether or not Pond A, Pond B, and the waste pile are affecting the ground water.

l. records of any program that the Army has in place to determine whether or not each unit has had a release into the environment.

m. all documents relating to the choice of material, design, construction, installation, and qa/qc procedures for the three tanks and their internal liners and the liners for Ponds A and B and the waste pile.

257. In addition, the Army shall make available for inspection by CDH all documents which are re-

quired to be maintained by 6 CCR 1007-3, no later than the effective date of this Final Compliance Order.

258. Within 30 days of the effective date of this Final Compliance Order, the Army shall complete construction of an emergency containment structure surrounding the three Basin F storage tanks. The containment structure must be designed to contain the total content of the three tanks without experiencing overtopping or structural failure in the event of a catastrophic failure of the three tanks.

259. CDH reserves the right to impose such further conditions as necessary to ensure compliance with the Colorado Hazardous Waste Management Act, the 6 CCR 1007-3 regulations, and this Final Compliance Order.

NOTICE OF LIABILITY FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

Section 25-15-309, C.R.S. (1982), provides that any person who violates the Colorado Hazardous Waste Management Act, Sections 25-15-301 through 313, C.R.S. (1982 & 1988 Supp.), the regulations implementing the Act, 6 CCR 1007-3, or any compliance order of CDH which is not subject to a stay pending judicial review, shall be subject to a civil penalty of not more than $25,000 per violation for each day during which such violation occurs. The Army may be subject to suit for injunctive relief or civil penalties or both for failure to comply with Section 25-15-308 and this Final Compliance Order.

NOTICE OF EFFECTIVE DATE OF ORDER

This Final Compliance Order shall become effective 21 calendar days after receipt. The Final Compliance Order deadlines will remain as stated herein unless modified by an Administrative Law Judge or as otherwise provided by law. If you have any questions regarding this Final Compliance Order, contact

Frederick R. Dowsett
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Date: 9/1/89 By: /s/ Frederick R. Dowsett
FREDERICK R. DOWSETT
Unit Leader
Monitoring and Enforcement

Reviewed and Concurred In:

Date: 9/1/89 By /s/ David C. Shelton
DAVID C. SHELTON
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APPENDIX G

STATUTORY PROVISIONS INVOLVED

Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*, provides in relevant part:

§ 9601. Definitions

For purposes of this subchapter—

* * * * *

(23) The terms "remove" or "removal" means [*sic*] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary [*sic*] to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

(24) The terms "remedy" or "remedial action" means [*sic*] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and

offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means [*sic*] remove, removal, remedy, and remedial action;, [*sic*] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

42 U.S.C. 9601(23)-(25).

Section 113(h) and (j) of CERCLA provide in relevant part:

§ 9613. Civil Proceedings

* * * * *

(h) **Timing of Review**

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(j) **Judicial review**

(1) **Limitation**

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) **Standard**

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) **Remedy**

If the court finds that the selection of the response action was arbitrary and capricious

or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) **Procedural errors**

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

42 U.S.C. 9613(h) and (j).

Section 114(a) of CERCLA provides:

§ 9614. Relationship to other law

(a) Additional State liability or requirements with respect to release of substances within State

Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. 9614(a).

Section 120 of CERCLA provides:

§ 9620. Federal facilities

(a) Application of chapter to Federal Government

(1) **In general**

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

(2) **Application of requirements to Federal facilities**

All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this chapter for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this chapter.

(3) **Exceptions**

This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods. This subsection shall also not apply to any requirements relating to bonding, insurance, or financial responsibility. Nothing in this chapter shall be construed to require a State to comply with section 9604(c)(3) of this title in the case of a facility which is owned or operated by any department, agency, or instrumentality of the United States.

(4) **State laws**

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

(b) **Notice**

Each department, agency, and instrumentality of the United States shall add to the inventory of Federal agency hazardous waste facilities required to be submitted under section 3016 of the Solid Waste Disposal Act (42 U.S.C. 6937) (in addition to the information required under section 3016(a)(3) of such Act (42 U.S.C.

6937(a)(3))) information on contamination from each facility owned or operated by the department, agency, or instrumentality if such contamination affects contiguous or adjacent property owned by the department, agency, or instrumentality or by any other person, including a description of the monitoring data obtained.

(c) **Federal Agency Hazardous Waste Compliance Docket**

The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the "docket") which shall contain each of the following:

(1) All information submitted under section 3016 of the Solid Waste Disposal Act (42 U.S.C. 6937) and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this chapter with respect to the facility.

(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act (42 U.S.C. 6925, 6930).

(3) Information submitted by the department, agency, or instrumentality under section 9603 of this title.

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the

docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection.

(d) **Assessment and evaluation**

Not later than 18 months after October 17, 1986, the Administrator shall take steps to assure that a preliminary assessment is conducted for each facility on the docket. Following such preliminary assessment, the Administrator shall, where appropriate—

(1) evaluate such facilities in accordance with the criteria established in accordance with section 9605 of this title under the National Contingency Plan for determining priorities among releases; and

(2) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria.

Such criteria shall be applied in the same manner as the criteria are applied to facilities which are owned or operated by other persons. Evaluation and listing under this subsection shall be completed not later than 30 months after October 17, 1986. Upon the receipt of a petition from the Governor of any State, the Administrator shall make such an evaluation of any facility included in the docket.

(e) **Required action by department**

(1) **RI/FS**

Not later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence a remedial investigation and feasibility study for such facility. In the case of any facility which is listed on such list before October 17, 1986, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence such an investigation and study for such facility within one year after October 17, 1986. The Administrator and appropriate State authorities shall publish a timetable and deadlines for expeditious completion of such investigation and study.

(2) **Commencement of remedial action; interagency agreement**

The Administrator shall review the results of each investigation and study conducted as provided in paragraph (1). Within 180 days thereafter, the head of the department, agency, or instrumentality concerned shall enter into an interagency agreement with the Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility. Substantial continuous physical onsite remedial action shall be commenced at each facility not later than 15 months after completion of the

investigation and study. All such interagency agreements, including review of alternative remedial action plans and selection of remedial action, shall comply with the public participation requirements of section 9617 of this title.

(3) **Completion of remedial actions**

Remedial actions at facilities subject to interagency agreements under this section shall be completed as expeditiously as practicable. Each agency shall include in its annual budget submissions to the Congress a review of alternative agency funding which could be used to provide for the costs of remedial action. The budget submission shall also include a statement of the hazard posed by the facility to human health, welfare, and the environment and identify the specific consequences of failure to begin and complete remedial action.

(4) **Contents of agreement**

Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following:

(A) A review of alternative remedial actions and selection of a remedial action by the head of the relevant department, agency, or instrumentality and the Administrator or, if unable to reach agreement on selection of a remedial action, selection by the Administrator.

(B) A schedule for the completion of each such remedial action.

(C) Arrangements for long-term operation and maintenance of the facility.

(5) **Annual report**

Each department, agency, or instrumentality responsible for compliance with this section shall furnish an annual report to the Congress concerning its progress in implementing the requirements of this section. Such reports shall include, but shall not be limited to, each of the following items:

(A) A report on the progress in reaching interagency agreements under this section.

(B) The specific cost estimates and budgetary proposals involved in each interagency agreement.

(C) A brief summary of the public comments regarding each proposed interagency agreement.

(D) A description of the instances in which no agreement was reached.

(E) A report on progress in conducting investigations and studies under paragraph (1).

(F) A report on progress in conducting remedial actions.

(G) A report on progress in conducting remedial action at facilities which are not listed on the National Priorities List.

With respect to instances in which no agreement was reached within the required time period, the department, agency, or instrumentality filing the report under this paragraph shall include in such report an explanation of the reasons why no

agreement was reached. The annual report required by this paragraph shall also contain a detailed description on a State-by-State basis of the status of each facility subject to this section, including a description of the hazard presented by each facility, plans and schedules for initiating and completing response action, enforcement status (where appropriate), and an explanation of any postponements or failure to complete response action. Such reports shall also be submitted to the affected States.

(6) **Settlements with other parties**

If the Administrator, in consultation with the head of the relevant department, agency, or instrumentality of the United States, determines that remedial investigations and feasibility studies or remedial action will be done properly at the Federal facility by another potentially responsible party within the deadlines provided in paragraphs (1), (2), and (3) of this subsection, the Administrator may enter into an agreement with such party under section 9622 of this title (relating to settlements). Following approval by the Attorney General of any such agreement relating to a remedial action, the agreement shall be entered in the appropriate United States district court as a consent decree under section 9606 of this title.

(f) **State and local participation**

The Administrator and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant

State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 9621 of this title.

(g) **Transfer of authorities**

Except for authorities which are delegated by the Administrator to an officer or employee of the Environmental Protection Agency, no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise, to any other officer or employee of the United States or to any other person.

(h) **Property transferred by Federal agencies**

(1) **Notice**

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent

such information is available on the basis of a complete search of agency files.

(2) **Form of notice; regulations**

Notice under this subsection shall be provided in such form and manner as may be provided in regulations promulgated by the Administrator. As promptly as practicable after October 17, 1986, but not later than 18 months after October 17, 1986, and after consultation with the Administrator of the General Services Administration, the Administrator shall promulgate regulations regarding the notice required to be provided under this subsection.

(3) **Contents of certain deeds**

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain—

(A) to the extent such information is available on the basis of a complete search of agency files—

(i) a notice of the type and quantity of such hazardous substances,

(ii) notice of the time at which such storage, release, or disposal took place, and

(iii) a description of the remedial action taken, if any, and

(B) a covenant warranting that—

(i) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and

(ii) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.

The requirements of subparagraph (B) shall not apply in any case in which the person or entity to whom the property is transferred is a potentially responsible party with respect to such real property.

(i) **Obligations under Solid Waste Disposal Act**

Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) (including corrective action requirements).

(j) **National security**

(1) **Site specific Presidential orders**

The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protect the national security interests of the

United States at that site or facility. Such orders may include, where necessary to protect such interests, an exemption from any requirement contained in this subchapter or under title III of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11001 et seq.) with respect to the site or facility concerned. The President shall notify the Congress within 30 days of the issuance of an order under this paragraph providing for any such exemption. Such notification shall include a statement of the reasons for the granting of the exemption. An exemption under this paragraph shall be for a specified period which may not exceed one year. Additional exemptions may be granted, each upon the President's issuance of a new order under this paragraph for the site or facility concerned. Each such additional exemption shall be for a specified period which may not exceed one year. It is the intention of the Congress that whenever an exemption is issued under this paragraph the response action shall proceed as expeditiously as practicable. The Congress shall be notified periodically of the progress of any response action with respect to which an exemption has been issued under this paragraph. No exemption shall be granted under this paragraph due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation.

(2) **Classified information**

Notwithstanding any other provision of law, all requirements of the Atomic Energy Act (42 U.S.C. 2011 et seq.) and all Executive orders concerning the handling of restricted data and national security information, including "need to know" requirements, shall be applicable to any grant of access to classified information under the provisions of this chapter or under title III of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11001 et seq.).

42 U.S.C. 9620.

Section 121 of CERCLA provides:

§ 9621. Cleanup standards

(a) **Selection of remedial action**

The President shall select appropriate remedial actions determined to be necessary to be carried out under section 9604 of this title or secured under section 9606 of this title which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response. In evaluating the cost effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

(b) General rules

(1) Remedial actions in which treatment which permanently and significantly reduces the volume,

toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The President shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the President shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the President shall, at a minimum, take into account:

(A) the long-term uncertainties associated with land disposal;

(B) the goals, objectives, and requirements of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;

(D) short- and long-term potential for adverse health effects from human exposure;

(E) long-term maintenance costs;

(F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and

(G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If the President selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected.

(2) The President may select an alternative remedial action meeting the objectives of this subsection whether or not such action has been achieved in practice at any other facility or site that has similar characteristics. In making such a selection, the President may take into account the degree of support for such remedial action by parties interested in such site.

(c) **Review**

If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if

upon such review it is the judgment of the President that action is appropriate at such site in accordance with section 9604 or 9606 of this title, the President shall take or require such action. The President shall report to the Congress a list of facilities for which such review is required, the results of all such reviews, and any actions taken as a result of such reviews.

(d) **Degree of cleanup**

(1) Remedial actions selected under this section or otherwise required or agreed to by the President under this chapter shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if—

(i) any standard, requirement, criteria, or limitation under any Federal environmental law, including, but not limited to, the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U. S.C. 1251 et seq.), the Marine Protection, Research and Sanctuaries Act (33 U. S.C. 1401 et seq.), or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.); or

(ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 9604 of this title or secured under section 9606 of this title shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act (42 U.S.C. 300f et seq.) and water quality criteria established under section 304 or 303 of the Clean Water Act (33 U.S.C. 1314, 1313), where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release.

(B)(i) In determining whether or not any water quality criteria under the Clean Water Act (33

U.S.C. 1251 et seq.) is relevant and appropriate under the circumstances of the release or threatened release, the President shall consider the designated or potential use of the surface or groundwater, the environmental media affected, the purposes for which such criteria were developed, and the latest information available.

(ii) For the purposes of this section, a process for establishing alternate concentration limits to those otherwise applicable for hazardous constituents in groundwater under subparagraph (A) may not be used to establish applicable standards under this paragraph if the process assumes a point of human exposure beyond the boundary of the facility, as defined at the conclusion of the remedial investigation and feasibility study, except where --

(I) there are known and projected points of entry of such groundwater into surface water; and

(II) on the basis of measurements or projections, there is or will be no statistically significant increase of such constituents from such groundwater in such surface water at the point of entry or at any point where there is reason to believe accumulation of constituents may occur downstream; and

(III) the remedial action includes enforceable measures that will preclude human exposure to the contaminated groundwater at any point between the facility boundary and all known and projected points of entry of such groundwater into surface water

then the assumed point of human exposure may be at such known and projected points of entry.

(C)(i) Clause (ii) of this subparagraph shall be applicable only in cases where, due to the President's selection, in compliance with subsection (b)(1) of this section, of a proposed remedial action which does not permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances, pollutants, or contaminants, the proposed disposition of waste generated by or associated with the remedial action selected by the President is land disposal in a State referred to in clause (ii).

(ii) Except as provided in clauses (iii) and (iv), a State standard, requirement, criteria, or limitation (including any State siting standard or requirement) which could effectively result in the statewide prohibition of land disposal of hazardous substances, pollutants, or contaminants shall not apply.

(iii) Any State standard, requirement, criteria, or limitation referred to in clause (ii) shall apply where each of the following conditions is met:

(I) The State standard, requirement, criteria, or limitation is of general applicability and was adopted by formal means.

(II) The State standard, requirement, criteria, or limitation was adopted on the basis of hydrologic, geologic, or other relevant considerations and was not adopted for the purpose of precluding onsite remedial actions or other land disposal for reasons unrelated to protection of human health and the environment.

(III) The State arranges for, and assures payment of the incremental costs of utilizing, a facility for disposition of the hazardous substances, pollutants, or contaminants concerned.

(iv) Where the remedial action selected by the President does not conform to a State standard and the State has initiated a law suit against the Environmental Protection Agency prior to May 1, 1986, to seek to have the remedial action conform to such standard, the President shall conform the remedial action to the State standard. The State shall assure the availability of an offsite facility for such remedial action.

(3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act (42 U.S.C. 6924, 6925) (or, where applicable, in compliance with the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:

(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.

(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.).

The President shall notify the owner or operator of such facility of determinations under this paragraph.

(4) The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation as required by paragraph (2) (including subparagraph (B) thereof), if the President finds that—

(A) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

(B) compliance with such requirement at that facility will result in greater risk to human health and the environment than alternative options;

(C) compliance with such requirements is technically impracticable from an engineering perspective;

(D) the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach;

(E) with respect to a State standard, requirement, criteria, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criteria, or limitation in similar circumstances at other remedial actions within the State; or

(F) in the case of a remedial action to be undertaken solely under section 9604 of this title using the Fund, selection of a remedial action that attains such level or standard of control will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats.

The President shall publish such findings, together with an explanation and appropriate documentation.

(e) **Permits and enforcement**

(1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

(2) A State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is

located. Any consent decree shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate Federal and State agencies. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree.

(f) **State involvement**

(1) The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State. The regulations, at a minimum, shall include each of the following:

(A) State involvement in decisions whether to perform a preliminary assessment and site inspection.

(B) Allocation of responsibility for hazard ranking system scoring.

(C) State concurrence in deleting sites from the National Priorities List.

(D) State participation in the long-term planning process for all remedial sites within the State.

(E) A reasonable opportunity for States to review and comment on each of the following:

(i) The remedial investigation and feasibility study and all data and technical documents leading to its issuance.

(ii) The planned remedial action identified in the remedial investigation and feasibility study.

(iii) The engineering design following selection of the final remedial action.

(iv) Other technical data and reports relating to implementation of the remedy.

(v) Any proposed finding or decision by the President to exercise the authority of subsection (d)(4) of this section.

(F) Notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State and an opportunity to participate in such negotiations and, subject to paragraph (2), be a party to any settlement.

(G) Notice to the State and an opportunity to comment on the President's proposed plan for remedial action as well as on alternative plans under consideration. The President's proposed decision regarding the selection of remedial action shall be accompanied by a response to the comments submitted by the State, including an explanation regarding any decision under subsection (d)(4) of this section on compliance with promulgated State standards. A copy of

such response shall also be provided to the State.

(H) Prompt notice and explanation of each proposed action to the State in which the facility is located.

Prior to the promulgation of such regulations, the President shall provide notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State, and such State may participate in such negotiations and, subject to paragraph (2), any settlements.

(2)(A) This paragraph shall apply to remedial actions secured under section 9606 of this title. At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree.

(B) If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 9606 of this title before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement,

criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.

(C) The President may conclude settlement negotiations with potentially responsible parties without State concurrence.

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have

the remedial action conform to such standard, requirement~~, criteria~~, or limitation, the State may maintain an action as follows:

(i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.

(ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.

(iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation.

42 U.S.C. 9621.

Section 122(e)(6) of CERCLA provides:

§ 9622. Settlements

* * * * *

(e) **Special notice provisions**

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(6) **Inconsistent response action**

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. 9622(e)(6).

Section 302(d) of CERCLA provides in relevant part:

§ 9652. Effective dates; savings provisions

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. * * *

42 U.S.C. 9652(d).

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No. 93-786

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,
vs.
STATE OF COLORADO AND COLORADO DEPARTMENT OF HEALTH,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS STATE OF COLORADO AND COLORADO DEPARTMENT OF HEALTH TO THE UNITED STATES' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Colorado issued a compliance order to correct the Army's mismanagement of hazardous waste at the Basin F area of the Rocky Mountain Arsenal. The question presented is whether the Army's initiation of CERCLA activities bars the State from enforcing its EPA-authorized RCRA hazardous waste management authority, including inspections, monitoring, and emergency response requirements.

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STATUTORY PROVISIONS INVOLVED

Section 114(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601-9675, provides:

> (a) **Additional State liability or requirements with respect to release of substances within State.**
>
> Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. § 9614(a).

Section 120(i) of CERCLA provides:

> **(i) Obligations under Solid Waste Disposal Act**
>
> Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (including corrective action requirements).

42 U.S.C. § 9620(i).

Section 302(d) of CERCLA provides in relevant part:

> (d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d).

Other related CERCLA provisions are reproduced in the appendix to this brief in opposition, as are relevant portions of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987.

STATEMENT OF THE CASE

To meet the burgeoning task of managing and cleaning up toxic waste facilities that pose threats to public health and the environment, Congress has legislated a comprehensive enforcement

scheme of compatible laws that give both the federal and state governments active roles. Central to this scheme are the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 ("RCRA"), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA"). RCRA sets up a management program to deal with hazardous materials from initial generation through treatment, storage, and final disposal.[1] The United States Environmental Protection Agency ("EPA") may authorize states to "carry out" their own hazardous waste programs "in lieu of" the federal RCRA. 42 U.S.C. § 6926(b).[2] As the court of appeals explained, RCRA establishes a prospective cradle-to-grave regulatory program for hazardous waste generated, treated or stored after 1980. Petitioner's Appendix ("Pet. App.") at 5a. CERCLA, on the other hand, contains no substantive requirements or standards for the daily operation and management of hazardous waste sites; it is a remedial statute designed for responding to and financing the actual cleanup of contaminated sites. Pet. App. at 6a-7a.

The present case arises out of Colorado's efforts to exercise its federally-authorized role in the management and cleanup of hazardous wastes at the Rocky Mountain Arsenal located northeast of Denver, Colorado. The Arsenal is a 27-square mile, federally-owned facility which has been operated by the United States Army since 1942. For most of the intervening 50 years, the Army generated, treated, stored and disposed of hazardous materials at the Arsenal, such as pesticides, nerve gas and byproducts of its chemical warfare

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[1] RCRA also provides for corrective action where treatment, storage or disposal units have leaked, releasing hazardous wastes into the environment. 42 U.S.C. § 6924 (u), (v) (RCRA § 3004 (u), (v)), 42 U.S.C. § 6928 (h) (RCRA § 3008 (h)). *See* App. *infra* pp. A-1 to A-3.

[2] Colorado's program, the Colorado Hazardous Waste Management Act, Colo. Rev. Stat. §§ 25-15-301 - 313 (1989) ("CHWMA"), was authorized in 1984. 49 Fed. Reg. 41,036 (Oct. 19, 1984).

manufacturing activities. Since 1989, the sole mission of the Army at the Arsenal has been site cleanup.

The crux of the present litigation is not who has authority to determine the appropriate remedy for the entire Arsenal, as the United States claims (United States' Petition ["Pet."] at 11), but rather the proper management of huge quantities of liquid and solid hazardous wastes from the 92.7 acre waste pond within the Arsenal known as Basin F. *See* Pet. App. at 3a. This is a critical distinction. RCRA regulation of on-going hazardous waste management activities requires compliance with protective procedures not contemplated by the CERCLA process. For example, unlike RCRA, CERCLA does not address the need for routine inspections of equipment and waste storage units to ensure their physical integrity. *See* ARARs discussion *infra* p. 21. Thus, RCRA fills a regulatory void in the CERCLA process for the day-to-day management of hazardous wastes and the units in which they are stored, treated or disposed.[3]

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[3] The Basin F experience demonstrates the unique and necessary role RCRA plays in the management of hazardous wastes at CERCLA sites. In closing Basin F to eliminate the source of extensive groundwater contamination, liquid and solid hazardous wastes were removed and placed into newly constructed storage units pending ultimate treatment. These storage units (3 tanks, 2 ponds, and a waste pile) still store Basin F wastes today, and are typical of the type of facility regulated by RCRA. Colorado's Final Amended Compliance Order ("FACO") reveals that the CERCLA process, as employed by the Army, failed to address routine management of these units once constructed. Thus, leaks in two tanks and breached primary liners in the ponds and wastepile went undetected until after the State conducted its RCRA inspections. *See* FACO paras. 16, 123-24, 133, 173-194, Pet. App. at 62a, 82a, 83a, 94a-97a. Those inspections discovered the Army's lack of routine recordkeeping and inspection procedures ordinarily designed to monitor the integrity of storage units. *Id.* at paras. 120-134, 223-228, Pet. App. at 82a-84a, 103a. Such procedures are fundamental requirements of RCRA. The conditions found by the State in its inspections underscores the need for these requirements to protect the health and environment of the citizens of Colorado.

The facts of this case are not as presented by the United States in its petition. The State will attempt to correct the misstatements of fact below.[4]

The Army initially conceded that RCRA applies to Basin F. At the time CERCLA was enacted in December, 1980, the Army admitted that RCRA properly applied to portions of the Arsenal, including Basin F. The Army accordingly submitted the required RCRA Part A permit application to EPA in November, 1980.[5] The Part A application identified Basin F as a hazardous waste surface impoundment subject to RCRA regulation. In 1982, the Army entered into a Memorandum of Agreement with the State of Colorado, the EPA, and Shell Oil Company,[6] which recognized Basin F as a RCRA hazardous waste storage facility, and by which the Army agreed to conduct closure and post-closure operations at the basin pursuant to RCRA and "applicable State requirements." In 1983, the Army submitted to EPA a revised RCRA Part A application and a detailed Part B application, which included a RCRA closure plan for Basin F. After review, both the EPA and the Colorado Department of Health ("CDH") declared the closure plan deficient. In May 1984, the EPA issued a Notice of Deficiency to the Army for its entire Part B RCRA application, which included requirements for several of the Arsenal's RCRA units and, notably, Basin F.

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[4] "[T]he brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1.

[5] RCRA provides a two-step permit application process, the steps of which are commonly referred to as Part A and Part B. *See* Pet. App. at 8a, n.7.

[6] Shell Oil Company is the other Arsenal polluter, having caused widespread contamination with its pesticide manufacturing conducted over the course of approximately 30 years.

In November 1984, the EPA authorized Colorado to administer and enforce the Colorado Hazardous Waste Management Act ("CHWMA") "in lieu of" the federal RCRA program. *See supra* note 2. That month, the Army submitted its Part B application to CDH. Just as EPA had done, CDH requested the Army revise the Basin F closure plan. Despite the United States' current claims to the contrary (*see*, *e.g.*, Pet. at 11), the Army persevered in its attempts to address Basin F under the aegis of the State's CHWMA program by submitting a new Basin F closure plan to CDH in December 1985.

CDH found the new closure plan inadequate, and issued its own draft partial closure plan for public comment in May 1986. Pursuant to CHWMA, the Army participated in the June 1986 public meeting on the State's draft plan, and later provided lengthy comments on the plan. On October 1, 1986, Colorado issued its final Modified Basin F Closure Plan, which incorporated most of the Army's comments. One year later, the Army abruptly reversed its position on the applicability of RCRA, and informed Colorado that it intended to clean up Basin F solely pursuant to CERCLA.

Thus, while the United States alleges that it began a CERCLA remedial investigation and feasibility study in October 1984 (Pet. at 11), it was not until October 1987, three months after most of the Arsenal was listed on the CERCLA National Priorities List ("NPL"),[7] that the Army notified the State that it was withdrawing

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[7] The Arsenal was listed on the NPL on July 11, 1987. 52 Fed. Reg. 27619. Basin F was excluded from that listing because EPA believed that it would be cleaned up pursuant to RCRA/CHWMA. 54 Fed. Reg. 10512, 10515-16 (Mar. 13, 1989). Basin F itself was not listed on the NPL until March 13, 1989 (*id.*), exactly 17 days after a federal district court opinion in the State's underlying enforcement case held that CERCLA section 120(a) clearly preserves State authorities at federal facilities not on the NPL. *State of Colorado v. United States Dep't of the Army*, 707 F. Supp. 1569 (D.Colo. 1989) (App. *infra* p. B-1). Interestingly, on the very same day that Basin F was listed, the United States moved the district court for reconsideration of its opinion based on the fact that Basin F was listed.

its RCRA Part B application for the Arsenal's RCRA units. Therefore, though the United States has relied on revisionist history throughout this litigation, the record shows that the Army recognized the application of RCRA/CHWMA to Basin F closure until October 1987.[8] As the court of appeals found, the Army responded to the State's Basin F closure plan by suddenly questioning the State's RCRA jurisdiction. Pet. App. at 10a. Thus began the jurisdictional confrontation that has culminated in the case now before the Court.

The Final Amended Compliance Order ("FACO"), the subject of the immediate lawsuit, resulted from Colorado's attempts to exercise its EPA-authorized RCRA authority following the federal district court's February 1989 decision. *State of Colorado v. United States Dep't of the Army*, App. *infra* pp. B-1 to B-21. Having had its independent authority recognized by the district court, the State reinspected Basin F and issued the FACO to address the CHWMA violations discovered there. CDH issued the FACO to the Army in September 1989. At that time, the Army was in the final stages of the first of two CERCLA interim response actions ("IRAs") to deal with liquid hazardous wastes stored at Basin F. The FACO does not, as alleged by the United States (*see, e.g.*, Pet. at 4), seek to "assert direct control over cleanup of the site, independently of CERCLA, by issuing an administrative compliance order dictating response activities under [CHWMA]." Nor does it require the Army to obtain permits for activities at Basin F, as the United States disingenuously implies.[9] Pet. at 24. The compliance order merely seeks to assert

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[8] Notably, during this same period, the Army continued to recognize CHWMA at other Arsenal RCRA facilities. For example, the Salts Storage Container Facility, which stored upwards of 76,000 drums of waste from nerve gas incineration, was closed on October 15, 1986 pursuant to a CDH-amended closure plan.

[9] The FACO does require the Army to update the information contained in its existing RCRA permit applications. These applications are the means by which the State gains information from any RCRA interim status facility necessary to ensure the safe management of hazardous wastes. *See* Pet.

some authority over the ongoing treatment, storage and disposal of hazardous wastes at the Arsenal. It does this by requiring the Army to submit an amended Basin F closure plan, and update the existing Part A application to reflect the newly constructed units that are storing Basin F wastes, or that will treat or dispose of such wastes. It also requires that certain plans and schedules addressing soil contamination, monitoring, and groundwater contamination be submitted to CDH as required by CHWMA. Pet. App. at 14a. Lastly, the compliance order noted 42 separate violations of the CHWMA, including failure to adequately inspect the Basin F hazardous waste storage tanks, ponds and waste pile for deterioration, and failure to report or properly respond to the leaking tanks used to store liquids removed from Basin F. CDH's order also cited the Army for failing to maintain operating and maintenance records and emergency response plans necessary for compliance with CHWMA.

The United States' charge that the interim action at Basin F "has been impeded by Colorado's refusal to channel its input through CERCLA's ARARs process" (Pet. at 18) totally misrepresents the facts. As the court of appeals found, the State never impeded, nor attempted to impede, cleanup at the basin. Pet. App. at 21a.

The United States asserts that when the Army "requested" Colorado to identify ARARs for the excavation IRA, the State did not respond. Pet. at 12. This claim is patently false. By letter received August 24, 1987, the Army notified Colorado that written identification of ARARs were due by 5 p.m. August 28, 1987. In the limited time allotted, Colorado was only able to submit a letter that identified RCRA/CHWMA as Basin F ARARs, and contained specific technical guidance documents pertaining to the siting of hazardous waste disposal facilities, and to methods for review of such sites. Also attached was a complete Arsenal-wide ARARs identification that the State had previously submitted, and that pertained to individual

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App. at 35a.

sites such as Basin F. Additionally, Colorado commented on the Army's Preliminary Draft Basin F IRA ARARs document on November 19, 1987.

The United States' implication that Colorado has opted out of the entire CERCLA process at the Arsenal is equally unfounded. *See, e.g.*, Pet. at 19-21, 25-26. In fact, the State has drafted and submitted to both the Army and EPA well over 12,000 pages of formal comments pursuant to the CERCLA process. These legal and technical comments are part of the official administrative record, and pertain to all aspects of the CERCLA remedial investigation and feasibility study ("RI/FS"), including each of the dozen or more interim response actions at the Arsenal. State comments cover everything from ARARs identification to analysis of alternatives, risk characterizations, proposed plans, and final decision and implementation documents. Furthermore, CDH employs several full time professional staff working on CERCLA aspects of the Arsenal; the State also retains outside experts in hydrogeology, human and environmental toxicology, and biostatistics to review and comment on Army proposals. The United States is acutely aware of this; in fact, it has reimbursed the State for the Army's share of $2 million in CERCLA response costs incurred by the State prior to 1989.[10] Since then, Colorado has expended considerable additional funds--well over $4 million--to participate as fully as the Army allows it to in the CERCLA RI/FS process for the entire Arsenal.

The problem is not the State's alleged unwillingness to participate. Rather, it is the Army's efforts to shut the State out by disregarding the State's input into the CERCLA process, and its noncompliance with State law. If the State had as much impact on the CERCLA process as the United States suggests (Pet. at 22), it would not need to bother with enforcement orders to assure

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[10] These response costs *exclude* any expenditures the State incurred in attempting to enforce compliance with CHWMA.

compliance with State law.

REASONS WHY THE PETITION SHOULD BE DENIED

By misrepresenting the facts, the United States depicts the legal issues as far more confrontational than they are in reality. The United States implies that if its petition is granted, the Court will have before it a situation where the State is dictating an inconsistent cleanup remedy and refusing to participate at all in the Army's CERCLA process. *See* Pet. at 17. Much as these fabricated circumstances would make for a compelling controversy requiring resolution by this Court, these are not the facts of this case. Should the Court determine to review this case, it will not have facts before it from which to decide a direct conflict between state and federal law, nor will it confront a reticent State lying in wait as the Army selects its CERCLA remedy.[11] Furthermore, as discussed in detail below, the United States' legal arguments fall short of meeting the standard required to warrant this Court's review. There is no important conflict regarding federal law in this case, and no split exists between the circuits.

I. A UNANIMOUS COURT OF APPEALS CORRECTLY GAVE EFFECT TO EACH PROVISION OF CERCLA AND RCRA. THUS, THERE IS NO CONFLICT REGARDING FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

The court of appeals accurately portrays the State's assertion

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[11] "Unless [the brief in opposition addresses Petitioner's misstatements of fact or law], the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration ... that such is not the case." Sup Ct. R. 15.1. *See supra* note 4.

of its RCRA authority at the Arsenal as a congressionally approved "attempt to enforce requirements of its federally authorized hazardous waste laws and regulations, consistent with its ongoing duty to protect the health and environment of its citizens." Pet. App. at 27a. The disagreement which lies at the heart of this litigation is not so much between the United States and Colorado as it is between the Army (and other federal polluters) and Congress. The Army is clearly unhappy with Congress over its choice to preserve, in CERCLA, the states' independent RCRA authority at federal facility CERCLA sites.

The United States' invocation of public policy arguments opposing CERCLA's preservation of state RCRA authority notwithstanding, the court of appeals' decision in this case does not raise important issues demanding this Court's review. State participation or control has become commonplace in environmental legislation. "One of the hallmarks of the environmental legislation passed by Congress in the 1970's was its increased reliance on a regulatory framework that has come to be known as cooperative federalism."[12] In its decision, the court of appeals merely acknowledges the cooperative federalism Congress preserved in enacting CERCLA. *See* 42 U.S.C. §§ 9606(a), 9614(a), 9620(i) and 9652(d).

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[12] Mark Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?*, 15 Env. Law Rptr. 10039, 10039 (Feb. 1985). This Court has recently cited as examples of Congress' scheme of cooperative federalism RCRA, the Clean Water Act, and the Occupational Safety and Health Act. *New York v. United States*, 112 S. Ct. 2408, 2424 (1992).

A. Congress Crafted RCRA and CERCLA to Work Together as a Comprehensive Regulatory Scheme to Address the Hazardous Waste Crisis.

RCRA is designed to provide detailed standards and requirements for the management of hazardous wastes from generation to permanent disposal. In RCRA, Congress encouraged EPA to authorize states to "carry out" their own hazardous waste programs "in lieu of" RCRA. Thus, Congress provided that state enforcement of EPA-authorized State hazardous waste management laws has "the same force and effect as action taken by [EPA]." 42 U.S.C. § 6926 (b), (d).

Congress supplemented existing hazardous waste law with CERCLA in an attempt to ensure the prompt cleanup of the thousands of polluted sites around the country. Congress attempted to achieve this massive cleanup goal by setting up a joint RCRA/CERCLA regulatory scheme that expressly preserves the ability of states to enforce their own hazardous waste laws at sites also addressed by CERCLA. In order to ensure that federal polluters were accountable to the states, Congress further provided an explicit waiver of the federal government's sovereign immunity in RCRA section 6001 (42 U.S.C. § 6961, App. *infra* p. A-4) and, in CERCLA section 120(i) (42 U.S.C. § 9620(i)), provided that nothing in CERCLA was to affect a federal facility's obligation to comply with a state's EPA-authorized RCRA program.[13]

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[13] In submitting the conference report for the Superfund Amendments and Reauthorization Act of 1986 ("SARA") to the Senate, Senator Dole described the proposed section 120, regarding federal facility compliance, as "clarifying" that CERCLA and RCRA require federal facilities to comply with all federal and state laws:

> This section [RCRA section 6001], together with section

> 120 of CERCLA, can leave no doubt that Federal facilities are subject to State laws, including State fees and penalties ... Thus, Federal facilities are subject to all State administrative and court procedures and sanctions, including penalties and injunctions. I am pleased the conferees chose to clarify these points. It is essential that the Government elected by the people to protect them not to [sic] be excused from protecting the public health under a Federal statute such as Superfund [CERCLA]. Such double standards are anathema to those of us who believe that the Federal Government's primary task is to protect the public, not to contaminate it.

132 Cong. Rec. S14895 (daily ed. Oct. 3, 1986). Another of the conference report's principal authors also noted past problems with federal polluters circumventing state and federal environmental laws: "[N]o loophole, it seems, is too small to be found by the Federal Government." *Id.* at S14903 (remarks of Sen. Stafford).

The attitude of being above the law repeatedly expressed by federal polluters led a frustrated Congress to pass the Federal Facilities Compliance Act of 1992, P.L. 102-386, 106 Stat. 1505 (Oct. 6, 1992). This Act amends RCRA to clarify that States may assess penalties against the federal government for RCRA violations. The committee report accompanying the House version of the bill related that "federal facilities present some of the very worst [RCRA] compliance problems" and that "[s]ignificant noncompliance by DOD facilities involving violations of [RCRA requirements] continue[s] to be reported" by state and federal oversight agencies. H.R. Rep. No. 141, 101st Cong., 1st Sess. 3 (1989). During floor debates on the conference bill, Congressman Dingell, a member of the conference committee, stated that:

> The bill is designed to ensure that authority to enforce Federal facilities' compliance with State or Federal hazardous waste provision [sic] accompanies the responsibility for administering those provisions. In almost every case this means the States, *which is entirely consistent with the underlying intent expressed by Congress in RCRA that the States be the primary implementers of this country's hazardous waste laws.*

Congress' preservation of state authority is especially important at federal facility sites, such as the Rocky Mountain Arsenal, where the extent of cleanup is being determined by the federal polluter. At federal facilities, EPA is severely constrained by the requirement that the "federal family" speak with one voice.[14] The lower courts both recognized that the relationship between EPA and the Army prevents EPA's monitoring of the CERCLA cleanup from serving as "an effective check on the Army's efforts." Pet. App. at 13a. *See also* App. *infra* pp. B-16 to B-18. The court of appeals correctly held that independent state authority is not only necessary, but congressionally mandated, to provide an effective process for achieving federal facility cleanups.

In spite of the clear limitation on EPA's oversight at federal facilities, the United States contends that a state's only role in protecting its citizens from federally-created contamination is simply to comment on the federal polluters' cleanup decisions. This interpretation provides little comfort to a state or its citizens.

The United States interprets CERCLA as nullifying the State's

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138 Cong. Rec. H9136-37 (daily ed. Sept. 23, 1992) (emphasis added).

[14] EPA recognizes its enforcement limitations at federal facilities:

> States are not subject to the same constraints as EPA regarding enforcement actions against Federal facilities. As a result, States generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. *States should use the full range of their enforcement authorities to address Federal facility violations to the same extent they are used for non-federal facilities* while meeting the requirements of timely and appropriate enforcement response.

EPA, Federal Facility Compliance Strategy, at VII-1 (November 1988) (emphasis added).

independent authority to apply and enforce any State environmental laws, including CHWMA, at the Arsenal from the time the RI/FS was initiated until after the final remedial action is implemented. The United States alleges that the RI/FS commenced in 1984. The final remedial action is currently projected to be selected in 1995, and implementation will consume at least an additional ten years. The United States argues that CERCLA precludes State authority over hazardous waste management at the Arsenal for the intervening 20-plus years. The court of appeals correctly rejected this argument that CERCLA abrogates Colorado's authority to protect the health and environment of its citizens pursuant to its federally-authorized hazardous waste management program.

Protecting its citizens from the potentially adverse effects resulting from the mismanagement of hazardous wastes, especially during protracted CERCLA remedial activities, is a real concern for the states. For example, during the Army's interim remediation efforts at Basin F, noxious emissions detected two to three miles from the Arsenal boundary caused Arsenal neighbors and workers to repeatedly experience adverse health effects, including headaches, respiratory problems, and rashes. *See* Pet. App. at 12a, n.11. Due to the Army's refusal to recognize the State's RCRA authority, the State was powerless to protect its citizens, short of evacuating the surrounding neighborhoods.

The policy disagreement expressed in the United States' petition is not an issue of "immense practical importance" (Pet. at 17) because CERCLA and RCRA authorities have been successfully melded at other federal facility sites. For example, at the Department of Energy's Hanford and Rocky Flats sites, state RCRA authority and federal CERCLA authority co-exist to address hazardous waste management and contaminant cleanup. Indeed, EPA has recognized the importance of the congressionally mandated CERCLA/RCRA/state law interface in its listing policy. In that policy, EPA states that the

> potential overlap between RCRA and CERCLA cleanup authorities is the result of Congressional design not site listings.
>
> * * * * *
>
> How RCRA authorities are affected (if at all) when CERCLA also applies to a site is a matter that varies greatly depending upon the facts of the site. In some cases, the NPL site is physically distinct from the RCRA-regulated hazardous waste management units, and corrective action or closure at the regulated units may proceed under RCRA, while at the same time a cleanup action is proceeding at another area of the property under CERCLA, without the risk of inconsistency or duplication of response action. In other cases, the releases or contaminant plumes may overlap, such that a comprehensive solution under one statute may be the most efficient and desirable solution. The questions of which authority should control, and of how to avoid potential duplication or inconsistency, are often implementation issues to be resolved in light of the facts of the case and after consultation between EPA and the concerned State.

54 Fed. Reg. 10,522-23 (1989).

In support of its assertion that the appellate court's decision raises important issues, the United States paints a harrowing picture of states ignoring the CERCLA process,[15] coming in at the last

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[15] The United States alleges that the State refused to cooperate with the CERCLA efforts. Pet. at 12, 18. This is not the case, as discussed *supra* pp. 8-9. Moreover, in 1990 the Army, EPA, the State, and Shell Oil Company (the Arsenal's other polluter) entered into an agreement recognizing and setting out the oversight roles of the State and EPA at the

minute to sabotage EPA's dutiful efforts and wreak general havoc.[16] Such unbridled speculation is unsupported and unreasonable.[17]

Given the current fiscal realities, it will always be desirable, if not necessary, to avoid duplicative cleanup efforts. The United States can be expected to defer to state-initiated cleanups with increasing frequency. *See, e.g., infra* note 27. Moreover, states can be expected to exercise their independent enforcement authorities at CERCLA sites only in cases where sufficient state involvement is not allowed, or at facilities which routinely violate state laws requiring

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site's incinerator, constructed to burn Basin F liquid wastes. Tough public opposition to the incinerator made State support critical to community acceptance of the project. The success of this project demonstrates the State's cooperative participation in the Arsenal's CERCLA process when given the opportunity.

[16] A scenario equally harrowing to that painted by the United States would be likely under its proffered interpretation of CERCLA. States would be relegated to the unenviable position of begging and cajoling federal authorities to comply with state law. The federal government, pressured to move forward with the cleanup, and at federal facilities to preserve resources, gives short shrift to the states' views and proceeds with an unacceptable response action. The states' only remedy at such point would be to wait until completion of the remedy and then sue under CERCLA to undo the work that had already transpired, resulting in delay to ultimate cleanup and gross waste of resources by all parties. Congress surely envisioned neither scenario. Rather, it intended that state and federal governments work together to achieve the common goal of cleanup.

[17] In fact, the Army's actions immediately following the denial of its petition for rehearing on June 30, 1993, belie its arguments that chaos will result unless the court of appeals decision recognizing state authority is overturned. The Army approached the State to request to enter into a CHWMA compliance order on consent to set out a schedule for demonstrating CHWMA compliance at the incinerator which treats Basin F liquids and the related Basin F ponds and tanks. Agreement on the compliance order was quickly reached, so that the order was signed on August 6, 1993. (In the order, the United States reserved all its rights to proceed with the present appeal.)

responsible management of hazardous wastes during the lengthy CERCLA process. The preservation of state authority, however, ensures that the states' efforts to protect their citizens and the environment are taken seriously by the United States, an important goal recognized by Congress and reflected in the several provisions of CERCLA discussed below.

B. The Petition Does Not Present an Adequate Legal Question Warranting Review by the Court.

Like its policy arguments, the United States' legal argument that there is a conflict of laws, or an otherwise important federal question, fails to justify review. Congress expressly preserved independent state authority in CERCLA. The United States' arguments to the contrary are without merit. Colorado's exercise of its RCRA authority does not "challenge" any CERCLA remedy, and is not precluded by CERCLA section 122(e)(6).

1. *Day-to-day Management of Hazardous Wastes Under CHWMA is Expressly Preserved Despite the Designation of the Arsenal as a CERCLA Site.*

CERCLA is clear on its face. No fewer than four provisions unequivocally preserve the application of state environmental laws at contaminated sites, like the Arsenal, regardless of whether those sites are also subject to CERCLA. 42 U.S.C. §§ 9606(a), 9614(a), 9620(i) and 9652(d).

Congress explicitly preserved the states' authority to regulate hazardous substances under state law, independent of CERCLA, through the following language in CERCLA section 114(a), entitled "Relationship to other law:"

Nothing in this chapter [CERCLA] shall be construed

> or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. § 9614(a).

In the CERCLA section dealing with "savings provisions," Congress clarified that:

> Nothing in this chapter [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d) (CERCLA section 302(d)).

And again, under CERCLA section 106(a), Congress emphasized that CERCLA cleanup authorities were to be exercised "*[i]n addition to any other action taken by a State* or local government." 42 U.S.C. § 9606(a) (App. *infra* p. A-1) (emphasis added). Thus, the express language of CERCLA confirms that Congress intended to supplement existing environmental law with CERCLA authorities, not supersede it. Taken together, the "savings clauses" of CERCLA sections 114(a), 302(d) and 106(a) leave no doubt as to Congress' intent to protect states' authority to enforce their environmental laws at CERCLA sites.

The United States argues that the CERCLA section 121 ARARs scheme, enacted in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), has superseded the earlier enacted savings clauses (Pet. at 24-25). However, the United States conveniently ignores another key provision, enacted along with the ARARs section, which unequivocally reaffirms congressional intent to preserve existing state authorities. In the "Federal Facilities"

section of SARA, Congress provides that:

> Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with *any* requirement of the Solid Waste Disposal Act [RCRA] (*including corrective action requirements*).

42 U.S.C. § 9620(i) (CERCLA section 120(i)) (emphasis added). Thus, Congress never intended state RCRA programs to be limited by CERCLA. As Senator Mitchell, one of the SARA conferees, explained:

> Section 6001 of [RCRA] clearly states that federal agencies are to be "subject to, and comply with, all Federal, State, interstate, and local requirements, both substance and procedural." This section, together with section 120 of CERCLA, can leave no doubt that Federal facilities are subject to State laws, including State fees and penalties.

132 Cong. Rec. S14918 (daily ed. Oct. 3, 1986).

In enacting SARA Congress could easily have repealed the savings clauses of sections 114(a), 302(d) and 106(a), yet it chose to retain them. The United States' suggestion that these provisions merely refer to the ARARs process (Pet. at 24-25) is illogical considering that all of these provisions were enacted years before the ARARs scheme ever existed.[18]

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[18] The United States is also wrong in its assertion that recognizing independent state authority makes the CERCLA ARARs process "a dead letter" (Pet. at 25). CERCLA applies to a wide variety of sites, including sites where RCRA jurisdiction does not exist; e.g., sites where the contaminants released do not meet the definition of "hazardous wastes" subject to RCRA. Also, as the court of appeals noted, the ARARs scheme

The present litigation questions the authority of the State to require the management and closure of a hazardous waste disposal facility (Basin F) in a manner that is protective of human health and the environment as required by state and federal hazardous waste laws. Congress' mandate in section 120(i) that the United States continue to comply with state RCRA programs preserves this authority. The ARARs process is not sufficient to ensure responsible management. For example, most, if not all, of the monitoring, inspection, and reporting requirements of CHWMA are *not* considered to be ARARs by the United States, because EPA does not recognize "procedural" requirements as state standards which the remedy must attain pursuant to CERCLA section 121(d)(2).[19] Yet these requirements are the means by which the State ensures the safe management of hazardous waste.[20]

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is particularly valuable for states which either do not have their own hazardous waste programs or choose not to exercise their independent enforcement authority, because it ensures that at least some of RCRA's requirements are met at CERCLA sites. Pet. App. at 34a.

[19] The United States mischaracterizes the role of the states in the CERCLA process. The ARARs process does not provide the states a "full opportunity to participate" (Pet. at 22) because state identified ARARs may be ignored or waived. In fact, the Army is currently denying that Colorado's Basic Standards for Groundwater are ARARs for its groundwater cleanup offsite.

[20] These are the types of requirements Colorado attempts to enforce with the FACO. The State's intent is to protect the health and environment of its citizens from the hazards of cleanup activities. Indeed, the violations discussed by the United States in note 6 of its petition, such as the unreported leaking tanks and breached liners, point to the need for state oversight of ongoing hazardous waste management at the Arsenal. *See supra* note 3.

2. *The United States' Arguments that CERCLA does not Preserve State Authority are Misplaced.*

a. Colorado's Exercise of Independent Authority is not a "Challenge" Prohibited by CERCLA Section 113(h).

The court of appeals properly determined that CERCLA section 113(h) does not apply in the present case. Section 113(h) denies federal court jurisdiction, with a few exceptions, to review challenges to CERCLA removal or remedial actions. As the court of appeals noted, section 113(h)

> does not bar federal courts from reviewing a CERCLA response action prior to its completion; rather, it bars federal courts from reviewing any "challenges" to a CERCLA response action. This is a critical distinction because an action by Colorado to enforce the final amended compliance order, issued pursuant to its EPA-delegated RCRA authority, is not a "challenge" to the Army's CERCLA response action. *To hold otherwise would require us to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention.*

Pet. App. at 19a (emphasis added). *See also* Pet. App. at 27a-28a.

Congress never contemplated that section 113(h) would preclude a state from enforcing its own hazardous waste laws and regulations. Section 113(h) was enacted to "prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA's cleanup activities." H.R. Rep. No. 253, 99th Cong., 2d Sess. 266 (1985). Colorado's

independent and complementary RCRA regulatory scheme is not intended to, nor will it, slow down or prevent CERCLA cleanup activities.

The United States' interpretation of section 113(h) would preclude Colorado from acting to protect the health, welfare, and environment of its citizens from the time a CERCLA investigation begins until cleanup is completed. As discussed *supra* p. 15, the Arsenal's CERCLA cleanup is expected to take decades to complete. Congress clearly did not intend, nor did it provide, that owners and operators of hazardous waste facilities could simply cease compliance with state hazardous waste management laws for extended periods of time. *See, e.g.*, CERCLA § 120(i) (42 U.S.C. § 9620(i)).

Furthermore, review by this Court of the United States' primary argument, that CERCLA section 113(h) precludes federal court jurisdiction, is unnecessary because the unique procedural history of this case is unlikely to be repeated. The State filed its original CHWMA enforcement action in state court. *See* Pet. App. at 10a. The United States successfully removed the state case to federal district court pursuant to 28 U.S.C. § 1442(a)(1).[21] This Court has since determined that such removal is improper. *Primate Protection League v. Tulane Education Fund*, 111 S. Ct. 1700, 1705 (1991). Thus, future cases involving state law claims, such as those alleged in the FACO, will most certainly be decided by state courts.

[21] Ironically, after removing the state law case to federal court, the United States argued that the federal court lacked jurisdiction to address the state law claims.

b. CERCLA Section 122(e)(6) does not Prohibit Colorado from Independently Enforcing its Hazardous Waste Laws.

Under a section governing EPA's settlements with *private* polluters, CERCLA contains a provision which precludes private parties from undertaking any remedial action not pre-approved by EPA. The United States argues that the "common sense import of Section 122(e)(6)" is that it precludes independent state enforcement unless specifically authorized by EPA. Pet. at 25-26. The court of appeals rightfully rejected this argument by properly reconciling section 122(e)(6) with the savings clauses and other provisions of CERCLA, easily concluding that the purpose of section 122(e)(6) was to prevent ill-advised actions by responsible parties from interfering with EPA's ultimate cleanup plans. Pet. App. at 36a-39a. This interpretation is supported by the EPA's listing policy, on which the United States so heavily relies (Pet. at 26):

> [CERCLA section 122(e)(6)'s] authorization mechanism would not affect normal hazardous waste management requirements under RCRA, such as complying with manifest, 90-day storage, and labeling requirements; *any RCRA-regulated hazardous waste management units operating at a CERCLA site must continue to comply with RCRA hazardous waste management requirements, even if a CERCLA response action is underway.*

54 Fed. Reg. 10523 (1989) (emphasis added). Thus, it is the United States, not the court of appeals, which fails to give meaning to every provision of CERCLA.

II. THERE IS NO SPLIT IN THE CIRCUITS AND NO OTHER CIRCUIT HAS ADDRESSED THE ISSUE WHICH WAS BEFORE THE TENTH CIRCUIT.

The United States' attempt to portray a split in the circuits on the issue of independent state authority is deceptive. Not one of the three cases cited by the United States addresses the issue before the Tenth Circuit, nor has any other court of appeals faced the question of the interaction of concurrent RCRA and CERCLA authority at federal facility cleanup sites.[22]

The United States cites to *Boarhead Corp. v. Erickson*[23] and *Schalk v. Reilly*[24] as conflicting decisions, but fails to explain the relevance of these CERCLA suits by private citizens and a potentially responsible party which attempted to halt implementation of CERCLA selected remedies at private party sites. The court of appeals noted that, unlike the present case, both *Boarhead* and *Schalk* involved private party challenges to CERCLA remedial actions clearly proscribed by CERCLA section 113(h). Pet. App. at 22a-24a. In contrast, this case involves the state asserting its EPA-authorized RCRA authority to oversee the management of hazardous wastes where a CERCLA remedy has yet to be selected. This question was not before, nor addressed by, the Seventh or the Third Circuits.

In the case upon which the United States relies most, *United States v. Akzo Coatings*,[25] the Sixth Circuit expressly held that the

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[22] Thus, no other court has had to interpret CERCLA section 120(i), which expressly preserves RCRA/CHWMA authorities at federal facilities.

[23] 923 F.2d 1011 (3d Cir. 1991).

[24] 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990).

[25] 949 F.2d 1409 (6th Cir. 1991).

terms of a court-entered consent decree, "and not the language of CERCLA," preempted an alternative state remedy. 949 F.2d at 1455. Thus, *Akzo* is also irrelevant to the issues raised in the present case. Moreover, the Sixth Circuit faced facts very different from those before the Tenth Circuit. In *Akzo*, the EPA had selected a CERCLA remedy, entered into a settlement with the responsible party, and lodged a consent decree with the court. The State of Michigan challenged EPA's selected CERCLA remedy by advancing an inconsistent alternative remedy: i.e., excavation and incineration as compared to the EPA's soil washing remedy -- compliance with both of which would be physically impossible. The Sixth Circuit limited its holding to a recognition that CERCLA proscribes state "interference with the proper implementation of the [consent] decree" once entered.[26] *Id.* at 1458.

In contrast, the present case involves Colorado's enforcement of its environmental laws to ensure that the day-to-day management of hazardous wastes at the Arsenal are conducted in a manner protective of human health and the environment. There is no final selected remedy at the Arsenal, and the State is not attempting to propose an alternative remedy -- inconsistent or not. As the court of appeals wisely concluded, "[u]nlike the state in *Akzo Coatings*, Colorado is asserting its independent EPA-authorized RCRA authority rather than challenging the selection of a CERCLA remedy." Pet. App. at 34a, n.21.

Because there is no split in the circuits, this case does not warrant the Court's review. Furthermore, this Court should give Congress the opportunity to address the policy issues presented by

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[26] The United States incorrectly broadens the *Akzo* court's holding to conclude that "CERCLA precludes imposition of 'independent state remedies' *once a CERCLA action is underway.*" Pet. at 19 (emphasis added). Rather, the court expressly limited its holding to circumstances where a final remedy has been selected and a consent decree lodged with the court. 949 F.2d at 1455, 1456.

this case prior to review by this Court.

III. BECAUSE CONGRESS IS RECONSIDERING CERCLA THIS TERM, REVIEW BY THIS COURT IS NOT WARRANTED IN THIS CASE.

The United States' argument that independent state authority would result in chaos at CERCLA sites is directed to the wrong forum. CERCLA is to be reauthorized during this congressional term. If the United States can present a compelling policy argument that CERCLA should preclude state law at cleanup sites, it should address its concerns to Congress.[27]

Congress clearly intended that CERCLA co-exist with state environmental laws, rather than preclude them. The United States urges this Court to override Congress' clear choice, preclude states from exercising their historic police powers, and leave the sole regulation of federal facility cleanups to the federal polluter. This Court should decline to engage in such an exercise of judicial legislation. Indeed, this Court has admonished petitioners to seek relief from results which they believe Congress could not have intended "from the law making authority, and not [from] the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). *See also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575-76 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies

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[27] It appears that during reauthorization Congress will address the role of the states at CERCLA sites. An assistant EPA administrator recently testified before Congress that EPA is considering recommending legislative changes to increase state authority at CERCLA sites, including proposing that CERCLA programs be delegated to the states. *Greater State Role, National Standards Advocated by EPA, Agency Official Testifies*, 24 Env't Rep. (BNA) 1229 (Nov. 5, 1993).

with Congress and not with this Court. Congress may amend the statute; we may not.").

CONCLUSION

The United States depicts a simplistic and inaccurate view of the issues in this case: that Congress intended the ARARs scheme to constitute the sole role of state law at CERCLA sites. Rather, as the lengthy court of appeals decision demonstrates, this is a complicated regulatory area involving the interplay between two very technical statutes, both of which are before Congress for reauthorization. Review of the case by this Court would be a needless expenditure of judicial resources.

Thus, the petition for writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606 provides:

§ 9606. Abatement actions [CERCLA § 106]

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

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Sections 3004, 3008 and 6001 of the Resource Conservation and Recovery Act, 42 U.S.C. 6923 *et seq.*, provide in part:

§ 6923. Standards applicable to transporters of hazardous waste [RCRA § 3003]

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(u) Continuing releases at permitted facilities

Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

(v) Corrective action beyond facility boundary

As promptly as practicable after November 8, 1984, the Administrator shall amend the standards under this section regarding corrective action required at facilities for the treatment, storage, or disposal, of hazardous waste listed or identified under section 6921 of this title to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the Administrator that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Such regulations shall take effect immediately upon promulgation, notwithstanding section 6930(b) of this title, and shall apply to--

(1) all facilities operating under permits issued under subsection (c) of this section, and

(2) all landfills, surface impoundments, and waste pile units (including any new units, replacements of existing units, or lateral expansions of existing units) which receive hazardous waste after July 26, 1982.

Pending promulgation of such regulations, the Administrator shall issue corrective action orders for facilities referred to in paragraphs (1) and (2), on a case-by-case basis, consistent with the purposes of this subsection.

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§ 6928. Federal enforcement [RCRA § 3008]

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(h) Interim status corrective action

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

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§ 6961. Application of Federal, State, and local law to Federal facilities [RCRA § 6001]

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

APPENDIX B

STATE OF COLORADO, Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE ARMY, Defendant.

Civ. A. No. 86-C-2524.

United States District Court,
D. Colorado.

Feb. 24, 1989.

MEMORANDUM OPINION AND ORDER

CARRIGAN, District Judge.

Plaintiff, State of Colorado, commenced this action against the defendant, United States Department of the Army ("the Army") in the District Court for the City and County of Denver, Colorado, seeking an injunction to halt alleged present and future violations of certain Colorado statutes and regulations concerning hazardous waste management and control. The Army removed the case to this court.

The area giving rise to the lawsuit is known as "Basin F." It is a hazardous waste disposal pond situated within the Rocky Mountain Arsenal ("the Arsenal"). The arsenal is a federally controlled site occupying about 27 square miles near Commerce City, a suburban area northeast of Denver, Colorado. The Arsenal was constructed in 1942 to manufacture and assemble chemical warfare agents, chemical products and incendiary munitions. It also has been

used for detoxification and disposal of these toxic materials. Portions of the Arsenal have been leased to private operators, including Shell Oil Company ("Shell") for the manufacture of pesticides and herbicides. The United States owns and the Army operates the Arsenal. (Shell is a defendant in a companion CERCLA case, No. 83-C-2379. These two cases have been consolidated with a third, 83-C-2386.)

The Army constructed Basin F in 1956 to store and dispose of contaminated liquid wastes generated by the Army's and Shell's chemical manufacturing and processing activities. Basin F began receiving contaminated liquid wastes in October 1956.

As originally filed in the state court, the instant action concerns solely Basin F. The State's complaint asserted numerous claims against the Army based on Colorado's Ground Water Monitoring Regulations [Colorado Hazardous Waste Regulations, 6 CCR 1007-3, ("Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, 6 CCR 1007-3, Part 265, Subpart F), issued pursuant to the Colorado Hazardous Waste Management Act ("the CHWMA"), Title 25-15, part 3, C.R.S. (1982)]. These claims include: (1) failure to provide and monitor complying upgradient monitoring wells, in violation of § 265.91(a)(1) (First Claim); (2) failure to submit a specific ground water monitoring program, in violation of § 265.93(d)(2) (Second Claim); (3) failure to determine impact of Basin F on ground water quality, in violation of 6 CCR 1007-3, § 265.93(d)(2) (Third Claim); and (4) failure adequately to monitor and report ground water quality assessment, in violation of §§ 265.93(d)(5) and (7). The Army subsequently removed the action to this court.

On January 14, 1987, the Army filed a motion to dismiss or, in the alternative, for summary judgment or partial summary judgment, regarding the claims set forth in the plaintiff's complaint. The issues raised in the motion were fully briefed by the parties.

On December 4, 1987, the plaintiff filed its First Amended Complaint setting forth new claims and allegations. The First Amended Complaint alleges that in June, 1983, the Army submitted to the United States Environmental Protection Agency ("E.P.A") a plan to close Basin F. It further alleges that, subsequent to E.P.A.'s authorization to the State of Colorado to operate the State's hazardous waste management program, the Colorado Department of Health ("CDH") issued a final plan to close Basin F, pursuant to State Closure Regulations (6 CCR 1007-3, Part 265, Subpart G). The Basin F Closure Plan ("the Plan") became effective October 2, 1986, as a final order of the CDH. Defendant did not appeal, or otherwise seek review of the Plan. Pursuant to the Plan's terms, it is alleged, the Army was required to complete certain remedial steps effecting Basin F's closure by October 2, 1987.

In the First Amended Complaint, the plaintiff asserts claims against the Army for: (1) failure to close Basin F in compliance with the Basin F Closure Plan (First Claim); (2) failure to comply with Colorado's Ground Water Monitoring Regulations, a claim with three subclaims, and essentially a reassertion of three of the claims set forth in the plaintiff's initial complaint (Second Claim); and (3) failure to pay annual operating and waste volume fees, in violation of §§ 100.31(a) and (b) of State Fee Regulations, 6 CCR 1007-3, Part 100.

Plaintiff asserts that the Attorney General of the State of Colorado has standing and authority to prosecute this suit, pursuant to Executive Order No. D0012-86, issued February 4, 1986, under C.R.S. § 24-31-101(1)(a) (1982). The State Attorney General filed this action at the request of the CDH pursuant to C.R.S. §§ 24-4-106(3) and 25-15-308(2) (1982) seeking to halt present violations and prevent future violations of the CHWMA, as well as the Colorado Hazardous Waste Regulations, and to enforce the final order issued by CDH to close "Basin F." Plaintiff further asserts that this action is properly filed against the Army as defendant because Congress has waived sovereign immunity as to civil actions against federal entities

to enforce state requirements regarding hazardous waste management and disposal. For this proposition the State cites § 6001 of the Solid Waste Disposal Act, as amended by the Resource Conservation Act of 1976 ("RCRA") [42 U.S.C. §§ 6901-6987], 42 U.S.C. § 6961.

The Army has moved to dismiss the plaintiff's First Amended Complaint, asserting that the United States has not waived its sovereign immunity as to these claims under RCRA § 6001, [42 U.S.C. § 6961]. Defendant Army's argument in part emphasizes that I presently have pending before me two actions directed at cleanup of the Arsenal as a whole. As stated above, these consolidated cases are *State of Colorado v. United States*, Civil Action No. 83-2386, and *United States v. Shell Oil Company*, Civil Action No. 83-C-2379. Both cases were filed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* CERCLA was amended by the 1986 Superfund Amendments and Reauthorization Act ("SARA"), Pub.L. 99-499, 100 Stat. 1615.

Defendant Army does not dispute that RCRA § 6001 [42 U.S.C. § 6961], read in conjunction with RCRA § 7002 [42 U.S.C. § 6972], contains a waiver of federal sovereign immunity. Rather, the Army asserts that sovereign immunity is not waived under those sections when there is an ongoing CERCLA cleanup action at the site that addresses hazardous waste requirements that are the same in substance as those sought to be enforced by the state under RCRA. In essence, the Army argues that CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal.

Plaintiff State has responded by opposing the motion. Initially, I deny as moot the Army's first dispositive motion addressing the State's complaint, except for that portion of the defendant's argument that is reasserted in its second motion to dismiss.

At a hearing on the plaintiff's motion for injunctive relief, I briefly heard oral argument on the defendant's dismissal motion. More recently, the State has reasserted its position by moving for partial summary judgment, and the Army has filed an opposition memorandum to that motion. In addition, the parties have filed supplemental briefs at the court's request addressing whether the State is precluded from pursuing this action because the Army has commenced interim cleanup measures at Basin F; whether and to what extent the State will have a role in the Arsenal clean up if the instant action is dismissed; and whether the State is proceeding under RCRA § 7002, [42 U.S.C. § 6972] in this case. The parties also have filed briefs on whether the State's action is barred by the Supremacy Clause.

The issues thus have been fully briefed and orally presented by the parties. The matter is ripe for decision.

It is fundamental that the Untied States cannot be sued without its consent, and this immunity protects federal agencies such as the Army. In the absence of an express statutory waiver of immunity, an action against the United States must be dismissed for lack of jurisdiction. *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940); *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). A waiver of immunity must be strictly construed and must be confined to the terms and conditions specified. *Stubbs v. United States*, 620 F.2d 775 (10th Cir.1980); *Reynolds v. United States*, 643 F.2d 707 (10th Cir.1981).

Section 6001 of RCRA, [42 U.S.C. § 6961], provides in pertinent part:

> "*Each department, agency*, and instrumentality *of the executive*, legislative and judicial *branches of the Federal Government* ... engaged in any activity resulting, or which may result, in the disposal or management of solid or hazardous waste *shall comply*

with all Federal, *State*, interstate, and local *requirements*, both substantive and procedural (including any requirements for permits or reporting *or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief*), *respecting* control and abatement of solid waste or *hazardous waste disposal* in *the same manner*, and to the same extent, *as any person* is subject to such requirements, including the payment of reasonable service charges. *Neither* the *United States, nor any agent, employee, or officer* thereof, *shall be immune or exempt from any process or sanction of any State enforcement* of any *such injunctive relief* ...." 42 U.S.C. § 6961. (Emphasis added).

Relevant portions of RCRA § 7002, [42 U.S.C. § 6972] provide as follows:

"(a) In general.

... [A]ny person may commence a civil action on his own behalf--(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this Act [42 U.S.C. §§ 6901 et seq.]...."

* * * * * *

"(b) Actions prohibited.

* * * * * *

(2)(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

> (i) has commenced and is diligently prosecuting an action under section 7003 of this Act [42 U.S.C. § 6973] or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C § 9606],
>
> (ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C. § 9604];
>
> (iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C. 9604] and is diligently proceeding with a remedial action under that Act; or
>
> (iv) has obtained a court order (including consent decree) or issued an administrative order under section

> 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, or section 7003 of this Act [42 U.S.C. §§ 9606, 6973] pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action."

The term "person" who is authorized to commence such an action is defined elsewhere to include the State. 42 U.S.C. § 6903(15).

The Army stresses that these sections must be reconciled with certain CERCLA provisions that govern the manner in which federal agencies must undertake CERCLA cleanup actions and which specify the state role in those cleanup efforts. Defendant cites RCRA § 1006, [42 U.S.C. § 6905], in support of its argument that Congress intended that RCRA and CERCLA be integrated to avoid conflicts and to eliminate cleanup duplication. RCRA § 1006, [42 U.S.C. § 6905], states in relevant part:

> "(a) Nothing in this Act [42 U.S.C. §§ 6901 et seq.] shall be construed to apply (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act ..., the Safe Drinking Water Act ..., the Marine Protection, Research and Sanctuaries Act of 1972 ..., or the Atomic Energy Act of 1954 ..., except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts."
>
> "(b)(1) The [EPA] Administrator shall integrate all provisions of this Act [42 U.S.C. §§ 6901 et seq.]

> for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act ..., the Federal Water Pollution Control Act ..., the Federal Insecticide, Fungicide, and Rodenticide Act ..., the Safe Drinking Water Act ..., the Marine Protection, Research and Sanctuaries Act of 1972 ..., and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this Act ... and in the other acts referred to in this subsection."

RCRA §§ 1006(a) and (b), [42 U.S.C. § 6905(a) and (b)], were enacted as part of the 1976 RCRA amendments to the Solid Waste Disposal Act. The Army asserts that RCRA §§ 1006(a) and (b) do not specifically mention CERCLA because CERCLA was not enacted until 1980. However, the Army does not explain why there has been no amendment to include CERCLA in the list during the intervening eight years.

The issue before me thus concerns whether the provisions of RCRA and CERCLA can be harmoniously construed so as to permit the State to pursue a RCRA suit against the Army seeking enforcement of state hazardous waste cleanup and abatement laws at Basin F at the same time as other pending actions instituted under CERCLA are addressing the entire Arsenal cleanup. It is undisputed that the plaintiff's action here seeks to enforce, against the Army, *state* hazardous waste management laws and regulations (the CHWMA and regulations promulgated thereunder) administered "*in lieu of*" the federal RCRA program to the extent that the State has been so authorized by the E.P.A. 42 U.S.C. § 6926(b).

At a recent hearing, the State asserted that Basin F, and perhaps other areas within the Arsenal, are RCRA units. On the

other hand, the Army contends that the entire Arsenal constitutes an on-going CERCLA cleanup site, and that the E.P.A. is the primary enforcement authority. Basin F still has not been placed on the National Priorities List ("the NPL"), although the Army for years has been assuring this court that it would be so designated. Nevertheless, after much fine-tuning, the main point of the Army's argument is that permitting the State to "carve out" Basin F and proceed under RCRA, separate and apart from the Army's CERCLA cleanup anticipated for the Arsenal as a whole, will defeat CERCLA's aims and frustrate its purpose.

The matter has been further complicated because (1) the Army has not completed a CERCLA Remedial Investigation and Feasibility Study for Basin F, or even for the Arsenal, and the Record of Decision is not expected to be completed until 1993; (2) the Army projected to the State, pursuant to RCRA, that Basin F would be cleaned up and closed by October 1987; and (3) in March 1988, the Army commenced implementing certain "interim response" cleanup measures at Basin F and certain cleanup actions are substantially completed and still underway.

In *United States v. Shell Oil Co.*, 605 F.Supp. 1064 (D.Colo.1985), this court discussed in some detail the overriding purposes for which RCRA and CERCLA were enacted and the goals sought to be accomplished by each statutory scheme. As indicated there, RCRA was enacted to close the regulatory gap that existed because pre-RCRA federal environmental laws did not effectively regulate the disposal of environmental pollutants, including solid and hazardous wastes, on land. That opinion stated:

> "RCRA provides for the promulgation of regulations by the [USEPA] applicable to generators of hazardous waste, transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage and disposal facilities. The regulations established requirements respecting,

> among other things, record keeping practices, labeling practices, use of appropriate containers, use of a manifest system, and the design, construction, operation and maintenance of facilities." *Id.* at 1070.

In *Shell, supra*, I cited a Congressional Report [H.R.Rep. No. 96-1016, 96th Cong., 2d Sess. 22, *reprinted in* 1980 U.S.Code Cong. & Ad.News 6119, 6125] declaring that RCRA was enacted as a prospective "cradle-to-grave" regulatory regime that applies to past sites only to the extent that they are posing an imminent hazard. *Id.*

CERCLA was enacted to clean up inactive hazardous waste disposal sites. It established "'a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'" *Id.* at 1071. CERCLA was enacted to fill the regulatory gap left open by existing law. I further stated in *Shell*:

> "[W]hile pre-CERCLA law could prevent further pollution from the contemporary generation and disposal of hazardous wastes, it could not effectively abate the ongoing environmental deterioration resulting from wastes which had been dumped in the past. CERCLA was enacted to address this problem. It is by its very nature backward looking. Many of the human acts that have caused the pollution already had taken place before its enactment; physical and chemical processes are at their pernicious work, carrying destructive forces into the future."
>
> "The decision was made in CERCLA to clean up these inactive hazardous waste sites...." *Id.* at 1072.

Defendant sets forth several policy arguments in support of

its contention that CERCLA enforcement and remediation should be given exclusive jurisdiction and preclude RCRA enforcement through the present action. Included in the Army's broad policy arguments are the general assertions (1) that the court should give precedence to CERCLA because it is the more recent, specific statutory scheme for cleaning up hazardous waste contamination at federal facilities; (2) that enforcement under RCRA would disrupt the ongoing cleanup at the Arsenal and would impermissibly duplicate the CERCLA cleanup activities; and (3) that State RCRA enforcement would undermine the goals and policies that Congress set forth in CERCLA. Defendant cites various CERCLA provisions in support of these broad policy arguments.

For example, the State's closure plan and monitoring requirements are effectuated through a state permit process. In contrast, CERCLA § 121(e)(1), [42 U.S.C. § 9621(e)(1)], exempts CERCLA sites from having to acquire state or federal permits for remedial action conducted on site. Thus, the Army contends, the delays incurred in obtaining permits for RCRA enforcement would frustrate Congress's intent in enacting CERCLA as an effort to "speed up" the cleanup process. (I note that the instant CERCLA action has been pending since December 1983, and despite the court's frequent cajoling, the parties have constantly delayed efforts to bring the case to trial; nor have they proposed an overall plan for clean up as contemplated by CERCLA).

The Army further argues that the State's interest in having its administrative requirements satisfied with respect to Basin F are protected. In support of this argument, the Army relies on CERCLA § 121(d), [42 U.S.C. § 9621(d)], which provides that a State's environmental standards, including state RCRA requirements, shall be considered in determining the level of cleanup at a CERCLA site and will be applied to the extent that they are applicable, relevant and appropriate ("ARAR"). At nearly every hearing, however, the State has complained that it is being left out of the process and by-passed in decisions made by the Army and the EPA.

Next, the Army asserts, the Arsenal has been listed on the National Priorities List ("the NPL"), and Basin F has been proposed for listing and should be placed on the NPL "early in 1988." It is now February 1989. Pursuant to CERCLA § 120, [42 U.S.C. § 9620], the Army argues, the E.P.A., not the State of Colorado, is ultimately responsible for overseeing and approving all Arsenal cleanup activities. However, neither party has advised the court that Basin F has been listed on the NPL.

The Army contends that it began its CERCLA Remedial Investigation and Feasibility Study at the Arsenal in October 1984. The interim remedial action plan for Basin F was proposed in June 1986 and transmitted to the State on December 4, 1987. The Army's brief also outlines the interim response actions taken with respect to the Arsenal and Basin F. Defendant Army argues that the cleanup of the Arsenal and Basin F are "inextricably related."

Last, argues the Army, once a CERCLA cleanup is underway, the State's participation rights are defined and governed by CERCLA. CERCLA § 120(f), [42 U.S.C. § 9620(f)], affords the State the opportunity to participate in the planning and selection of remedial action. CERCLA § 121(f), [42 U.S.C. § 9621(f)], outlines the State's right to participate in the cleanup remedy selection process and to seek review of the remedy selected. As indicated above, pursuant to CERCLA § 121(d) and (e)(2), [42 U.S.C. §§ 9621 (d) and (e)(2)], the State may seek compliance with its own standards, such as permit requirements or other administrative requirements, if it is concerned that the CERCLA cleanup will not ensure adequate protection. The statute sets forth procedure the State can utilize to challenge judicially the United States' remedial action plan prior to its implementation. CERCLA § 121(f)(3)(B), [42 U.S.C. § 9621(f)(3)(B)].

Similarly, CERCLA §§ 117, [42 U.S.C. § 9617)], and 113(k), [42 U.S.C. § 9613(k)], provide for public participation in the cleanup process by providing an opportunity for the public to submit

written and oral comments, and to have a public meeting near the facility. RCRA, in contrast, does not provide for formal public participation.

In assessing the defendant's arguments, I first must examine other relevant CERCLA provisions.

> CERCLA § 114(a), [42 U.S.C. § 9614(a)], states:
>
> "(a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."

Additionally, CERCLA § 302(d), [42 U.S.C. § 9652(d)], provides in pertinent part:

> "(d) Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants...."

Even more explicitly, CERCLA § 120, part of SARA, [42 U.S.C. § 9620] states in pertinent part:

> "(a)(1) Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act [42 U.S.C. § 9607]. Nothing in this section shall be construed to affect the liability of any person or

entity under sections 106 and 107 [42 U.S.C. §§ 9606 and 9607]."

* * * * * *

"(a)(4) State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities *are not included* on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency or instrumentality." (Emphasis added).

* * * * * *

"(i) Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [42 U.S.C. §§ 6901 et seq.] (including corrective action requirements)."

Tenets of statutory construction provide that whenever a legislative body enacts a statute, it has in mind previous statutes relating to the same subject matter. The new provision is presumed to be in accord with the legislative policy embodied in prior statutes and all statutes should be construed together. 2A *Sutherland Statutory Construction* § 51.02 (Sands 4th ed.). As I emphasized in *Shell*, "... CERCLA must be construed in light of previous statutes relating to environmental pollution, ...," and notably, that includes RCRA. *Shell*, 605 F.Supp. at 1070.

Nothing in the cited statutes indicates that a CERCLA action should take precedence over a RCRA enforcement action. On the contrary, it appears that CERCLA was intended to operate independently of and in addition to RCRA, and that the statutory schemes are not mutually exclusive. *See Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F.Supp. 1049 (D.Ariz.1984) *aff'd* 804 F.2d 1454 (9th Cir.1986).

In fact, CERCLA § 120(a)(4), [42 U.S.C. § 9620(a)(4)], preserves state enforcement actions at federal facilities that are not listed on the National Priorities List. CERCLA § 120(i), [42 U.S.C. 9620(i)], requires the federal government to comply with the Solid Waste Disposal Act, and now RCRA, whether or not the facility is listed on the NPL. It is undisputed that Basin F is not listed on the NPL.

I realize that CERCLA was enacted after RCRA. However, I cannot read a conflict into statutes enacted on the same subject matter where none exists. Nor can I supply an amendment to a statute that Congress has chosen not to amend for over eight years.

The Army was one of the active polluters at Basin F. The Army thus is jointly and severally liable for the contamination at Basin F and its alleged harmful impact on the community that borders the Arsenal. Were I to dismiss this action, the Army's cleanup efforts would go unchecked by any parties whose interest are in any real sense adverse to those of the Army. The same Justice Department attorneys have repeatedly claimed to represent both the Army and the E.P.A. in this action, even though the Army is a defendant and the E.P.A. acts for the United States as a plaintiff. These Justice Department lawyers repeatedly have rejected this court's suggestions that representing these opposing parties constitutes a conflict of interest.

Since it is the E.P.A.'s job to achieve a clean up as quickly and thoroughly as possible, and since the Army's obvious financial

interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and wholeheartedly advocate both positions. For this reason, among others, I have been reluctant to approve the proposed "consent decree," which is fundamentally an agreement between the two polluters, the Army and Shell, to restrict future uses of Arsenal land and thereby limit cleanup standards, thus lowering costs for both defendants.

The Army, in effect, seeks full and unbridled discretion, subject only to E.P.A.'s input through the same attorneys who represent the Army, to regulate the Basin F cleanup, a process that has been ongoing for more than five years and is still nowhere near completion or resolution. CERCLA was enacted to "speed up" the cleanup process, not delay it.

Moreover, once the Army has satisfied what it considers to be its cleanup obligations, the State is responsible to its citizens if the process has not been thorough. Having the State actively involved as a party would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup.

Sites like the Arsenal, and especially Basin F, must be considered in the long range perspective of generations yet unborn and centuries still far over time's horizon. Indeed, if the instant CERCLA action fails to achieve an adequate cleanup, it is the people of Colorado who ultimately must pay either the price of cleanup, or the price of not cleaning up this, the worst hazardous and toxic waste site in America. It is not inappropriate that the present and future victims of this poison legacy, left in their midst by the Army and Shell, should have a meaningful voice in its cleanup. In RCRA, Congress has plainly provided them that voice through representation by the State. I hold that RCRA enforcement by the State is not precluded by CERCLA in the circumstances here presented.

I conclude that the E.P.A.'s potential monitoring of the Army's Basin F cleanup operation under CERCLA does not serve as an appropriate or effective check on the Army's efforts. As long as both of these federal agencies are represented in the Arsenal CERCLA actions by the same Justice Department lawyers who have professed that they have no conflict of interest, even though one of their clients is a plaintiff and another a defendant in the same consolidated action, there is no vigorous independent advocate for the public interest.

As an additional argument, the defendant asserts that the instant action is barred by sovereign immunity because the state regulatory standards sought to be applied are not precise or objective, and are ill-suited for uniform application. Defendant contends that RCRA § 6001, [42 U.S.C. § 6961], must be strictly construed and does not extend to circumstances in which the state has failed to promulgate objective and ascertainable regulations by which federal compliance can be fairly gauged. In support, the defendant cites *State of Fla. Dept. of Environmental Regulation v. Silvex Corp.*, 606 F.Supp. 159 (M.D.Fla.1985) and *Kelly v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

In *Silvex*, the State of Florida sued the United States Navy, among other defendants, asserting a claim for negligently releasing hazardous waste materials in violation of certain state statutes that permitted the State to take emergency action when the spillage of hazardous waste material posed an imminent threat to public health, safety and welfare. Florida contended that the Navy had consented to be sued under RCRA § 6001, [42 U.S.C. § 6961]. The Navy moved for dismissal on the ground that the state statutes sought to be enforced were not "requirements" as envisioned by Congress in RCRA § 6001, [42 U.S.C. § 6961]. The Army's argument in the instant case tracks the Navy's argument in the *Silvex* case.

In her analysis of the issue, Judge Black reviewed RCRA's legislative history and similar sovereign immunity waiver provisions

contained in analogous federal environmental laws. The district court's opinion stated, in pertinent part:

> "A legislative report discussing the pre-RCRA bill then before the Senate indicates the RCRA was intended to force federal agencies dealing with hazardous waste '*to comply with State and local controls* on solid waste and hazardous waste disposal as if they were private citizens.' This includes compliance with all substantive and procedural requirements, '*and specifically any requirements to obtain permits*.' Senate Report No. 94-988, 70th Cong., 2nd Session, at 24 (1976); 122 Cong.Rec. 32,631 (Sept. 27, 1976). The requirements referred to in the Senate report are more in the nature of regulatory guidelines and ascertainable standards that a federal agency dealing with hazardous waste would have to meet."
>
> "Senate Report No. 94-988 further states that section 6961 parallels the waiver provision of the Clean Air Act, 42 U.S.C. § 7418, and the Federal Water Pollution Control Act, 33 U.S.C. § 1323.... The legislative history of these provisions demonstrates a similar intent to have requirements defined as objective state standards of control...."
>
> "The courts interpreting requirements as used in federal environmental legislation have also limited the term to a state's regulatory requirements. Courts reviewing the waiver provisions of the Clean Air Act, the FWPA [Federal Water Pollution Act], and the Noise Control Act, 42 U.S.C. § 4903(b), the language of which, ..., directly parallels section 6961, consistently have held that requirements is a limited term which cannot be expanded to include the

kinds of state law liability provisions that the [State] relies on in this case...." (citations omitted).

* * * * * *

"... To achieve uniformity and consistency in state environmental regulation, sovereign immunity is partially waived to require federal entities to comply with state standards. This narrow intrusion into federal sovereign immunity has required that courts strictly define requirements as objective and ascertainable state regulations; e.g., state pollution standards or limitations, compliance schedules, emissions standards, and control requirements...." (citations omitted). *Id.* at 162-163.

The district court concluded that RCRA's legislative history and certain analogous federal statutes containing similar immunity waiver provisions have strictly defined "requirements" as synonymous with state objective regulations. Florida's action against the Navy was dismissed because the state statutes failed to set forth the specific, precise standards intended by the term "requirements" contained in RCRA § 6001, [42 U.S.C. § 6961].

The case of *Kelly v. United States, supra*, is similar. There the district court considered the waiver provision contained in the Federal Water Pollution Control Act, 33 U.S.C. § 1323(a), in the context of state claims under Michigan's water and environmental laws being asserted against a federal agency. The court dismissed the state claims because the state statutes did not provide "objective, quantifiable standards subject to uniform application." *Kelly*, 618 F.Supp. at 1108.

I have set forth in an appendix to this order the pertinent state regulations that apply to this action, including the regulations the Army has allegedly violated. As emphasized by the State in its brief,

these regulations track, almost verbatim, the federal regulations promulgated by E.P.A., pursuant to RCRA, that already apply to all federal agencies. *Compare* 6 CCR 1007-3, Subpart F, §§ 265.90 through 265.94 with 40 C.F.R. Part 265, Subpart F, §§ 265.90 through 265.94. Based on my review of these state regulations, I find and conclude that they set forth sufficiently specific and precise standards, subject to uniform application, to satisfy the term "requirements" as used in RCRA § 6001, [42 U.S.C. § 6961].

As can be clearly seen, RCRA § 6001, [42 U.S.C. § 6961], is all-encompassing since it provides that federal facilities are subject to "all Federal, State, Interstate, and local requirements, both substantive and procedural...." Giving the words used their plain, ordinary meaning, it is difficult to imagine a clearer statement of legislative intent: federal facilities such as Basin F at the Rocky Mountain Arsenal are subject to state and local requirements respecting the treatment and disposal of hazardous waste provided that those state and local requirements set out specific and precise standards subject to uniform application. Having found that the Colorado regulations satisfy these standards, I conclude that the Army's motion to dismiss based on this argument must be denied.

Accordingly, it is ORDERED that the defendant's motion to dismiss the First Amended Complaint, or in the alternative for summary judgment or partial summary judgment, is denied.

The plaintiff State of Colorado is ORDERED to amend to update [sic] its pending Motion for Preliminary Injunction and Motion for Partial Summary Judgment within 11 days, if it desires to do so, and apply for an expedited hearing specifying which issues remain for decision.

FILED
JAN 18 1994
OFFICE OF THE CLERK

No. 93-786

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF COLORADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The United States is conducting a cleanup of hazardous substances at the Rocky Mountain Arsenal pursuant to provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, which establish federal cleanup standards and provide a detailed process for incorporating both federal and state environmental standards into the CERCLA remedy. See Pet. 3-9, 12-13. The Tenth Circuit ruled in this case, however, that the State of Colorado may bypass that process by issuing compliance orders under state law. See Pet. 15-16; Pet. App. 1a-40a. As we explain in our petition, the court of appeals' decision warrants review because it presents an important issue concerning the relationship between federal and state authority, it conflicts with decisions of other

courts of appeals, and it incorrectly interprets the relevant provisions of CERCLA. Pet. 16-27. In response, Colorado has supplied an abundance of rhetoric criticizing the United States, but it has provided no persuasive legal argument counseling against review.

1. As our petition explains, CERCLA establishes a comprehensive process granting the States a major role in the CERCLA remedy selection process and directing how substantive state law shall be integrated into the CERCLA remedy. See Pet. 4-8, 22-25. Among other things, CERCLA provides that: (a) States must be afforded "substantial and meaningful" involvement in remedy selection; (b) the selected remedy must satisfy all "legally applicable or relevant and appropriate" requirements (ARARs) under federal law and more stringent state law, including state law authorized pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*; and (c) States may judicially challenge any decision by the United States to waive an ARAR and, if unsuccessful, may ensure that the requirement is met by providing the necessary additional funding. See Pet. 23; CERCLA § 121, 42 U.S.C. 9621. Furthermore, CERCLA grants States express authority to seek judicial enforcement of all ARARs, whether derived from federal or state law. See Pet. 7-8 n.3; CERCLA § 121(e)(2), 42 U.S.C. 9621(e)(2).[1]

This case places in question the significance of the CERCLA process that Congress has constructed to coordinate federal and state responsibilities at a CERCLA site. See Pet. 16-18. The United States submits that the CERCLA process provides the controlling basis for

[1] For those reasons, Colorado's claim that the CERCLA process relegates it to "begging and cajoling," leaving it "powerless" to protect its citizens (Br. in Opp. 15, 17 n.16), is inaccurate.

state participation once a federal facility is listed on the National Priorities List (NPL) and a federal response action is underway. Colorado contends that the process is simply an optional avenue for Colorado to enforce state standards at the site. That disagreement raises an issue of fundamental importance to the CERCLA program. Congress created a comprehensive scheme for the integration of substantive state law standards precisely because it was necessary to ensure that the United States and the individual States would coordinate their efforts through a single decisionmaking process that would produce a single coherent remedy. Pet. 17-18. Under Colorado's view, the ARARs process will come into play only when States "do not have their own hazardous waste programs or choose not to exercise their independent enforcement authority." See Br. in Opp. 20-21 n.18.[2]

Colorado devotes considerable energy to challenging our statement of the facts in this case, taking issue as to when the federal CERCLA cleanup actually commenced at the Rocky Mountain Arsenal, and attempting to minimize the dispute between the United States and the State as to the determination of cleanup requirements. Those arguments about factual details, however, have little to do with the legal question presented in our peti-

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[2] Significantly, 47 of the Nation's 56 States and Territories have RCRA-approved programs, and the remainder may have other applicable non-RCRA hazardous waste laws. Although Colorado generously states that the CERCLA process could be utilized at sites that are not subject to RCRA jurisdiction (Br. in Opp. 20 n.18), Colorado identifies no federal facility sites that it believes are subject to CERCLA jurisdiction only. Indeed, a facility that contains "hazardous substances" subject to CERCLA will also likely contain materials that fall within the broad definition of "hazardous waste" under RCRA. Compare CERCLA § 101(14), 42 U.S.C. 9601(14), with RCRA § 1004(5), 42 U.S.C. 6903(5).

tion. It is beyond dispute that the Arsenal's Basin F has been listed on the National Priorities List and that the United States is conducting an ongoing CERCLA cleanup at that location. The issue for this Court is whether, under those circumstances, Colorado may unilaterally impose state law requirements on the cleanup independently of the CERCLA process. See Pet. 18.[3]

Colorado also attempts to downplay the significance of the Final Amended Compliance Order (FACO), asserting that it "merely seeks to assert some authority" (Br. in Opp. 7-8) over the ongoing treatment and disposal of hazardous wastes. The FACO, however, requires the Army to submit for Colorado's approval a detailed Basin F closure plan and separate work and closure plans for each facility constructed for the federal CERCLA cleanup, which must provide for "final treatment/disposal of all Basin F liquid and solid hazardous wastes." Pet. App.

[3] Colorado's assertion that the United States has "misrepresent[ed]" the facts (*e.g.*, Br. in Opp. 10) as to the Arsenal cleanup history is surprising, given that our statement of facts is derived primarily from the court of appeals' opinion. Compare Pet. 10-15 with Pet. App. 8a-16a. For example, while Colorado casts doubt on whether the United States commenced a CERCLA remedial investigation and feasibility study in October 1984 (Br. in Opp. 6, 15), the court of appeals stated that "in October 1984, the Army commenced a CERCLA remedial investigation/feasibility study ('RI/FS')." Pet. App. 9a. Similarly, while Colorado asserts (Br. in Opp. 6-7) that the United States waited until October 1987 to inform the State that it intended to remedy Basin F under CERCLA, the court of appeals states that "[i]n June 1986, the Army announced that it was taking a CERCLA interim response action with respect to Basin F." Pet. App. 10a. The larger point, however, is that such details are irrelevant to whether, given that the United States *has* commenced a CERCLA cleanup at a federal facility listed on the NPL, Colorado may directly control federal response activities through state law compliance orders.

105a-108a. In turn, the FACO instructs that the "Army shall not implement any work plan, closure plan, or post-closure plan prior to approval by [Colorado]." *Id.* at 109a. Thus, the FACO effectively precludes the United States from implementing federal CERCLA response activities until Colorado approves them. See Pet. 14 & nn.6-7.[4]

2. As our petition explains (Pet. 18-20), the court of appeals' decision conflicts with other appellate decisions, most notably the Sixth Circuit's ruling in *United States* v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409 (1991). Colorado's assertion that *Akzo* is irrelevant because it involved a consent decree that precluded the State of Michigan from imposing a state-law remedy (Br. in Opp. 25-26), overlooks the significance of that decision. While the federal CERCLA remedy in *Akzo* was indeed embodied in a judicially approved decree, the remedy was developed (and incorporated state law standards) pursuant to CERCLA Section 121(f)'s ARARs process. The court specifically described the ARARs process (949 F.2d at 1455-1456) and stated that under that process, "more stringent state environmental laws must be incorporated by EPA into federal consent decrees if relevant and applicable, but thereafter the state may not seek other

[4] Colorado accuses the United States of "disingenuously" claiming that the FACO requires the United States to obtain state permits. Br. in Opp. 7. The FACO asserts, however, that the Army violated Colorado laws requiring that facilities "must apply for a State-issued RCRA permit" (Pet. App. 71a), and the FACO directs the Army to submit a revised RCRA "permit application" for every facility constructed for the CERCLA cleanup (*id.* at 113a). Thus, the FACO is contrary to CERCLA Section 121(e)(1)'s express directive that "[n]o Federal, State, or local permit shall be required" for any response action conducted entirely onsite where selected in compliance with Section 121 cleanup requirements. 42 U.S.C. 9621(e)(1).

remedies that are at odds with the terms of the decree" (*id.* at 1457). The *Akzo* court rejected Michigan's attempt to impose a different state law remedy precisely because it was contrary to the federal remedy developed under CERCLA Section 121(f). See 949 F.2d at 1458; Pet. 18-20.[5]

3. Our petition also demonstrates (Pet. 20-27) that review is warranted because the court of appeals' construction of CERCLA is erroneous. The court misinterpreted CERCLA's jurisdictional limits on the timing of judicial review, CERCLA's provisions governing state participation, and CERCLA's directive that, once a CERCLA remedial investigation and feasibility study has been initiated, States may not unilaterally compel responsible parties to take remedial action. See Pet. 20-27. Colorado defends the court's decision primarily by reliance on two general savings clauses in CERCLA. Br. in Opp. 18-24. As we show in our petition, however, those provisions do not allow States to ignore other express CERCLA provisions and bypass CERCLA's comprehensive remedy selection process. Pet. 24-25.

Colorado also cites two other CERCLA provisions. First, the State relies on CERCLA Section 106(a), 42

[5] Colorado additionally asserts that the Court need not examine CERCLA's jurisdictional limitations on timing of judicial review, CERCLA § 113(h), 42 U.S.C. 9613(h), because Colorado will likely file future actions against the United States in state court in a manner that would preclude removal. Br. in Opp. 23, citing *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 111 S. Ct. 1700 (1991). But even if Colorado successfully employs that tactic, other States may not. In any event, the question of Section 113(h)'s scope remains important in litigation apart from state enforcement actions. *E.g.*, *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011 (3d Cir. 1991). See Pet. 18, 21.

U.S.C. 9606(a), which it characterizes as another general "savings" clause. Br. in Opp. 19. Section 106(a) states that when the President determines that a hazardous substance release poses an "imminent and substantial endangerment," he may secure such relief as may be necessary "[i]n addition to any other action taken by a State or local government." 42 U.S.C. 9606(a). That provision, however, merely recognizes that a State or local government may already have taken some action under state law *before* the President acts under Section 106(a). It does not address whether federal law, once invoked, controls.[6]

Colorado also mistakenly relies (Br. in Opp. 19-20) on Section 120(i), which states that "[n]othing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of [RCRA] (including corrective action requirements)." 42 U.S.C. 9620(i). Colorado is, of course, seeking to enforce "its state hazardous waste management laws in lieu of RCRA." Pet. App. 61a-62a. But in any event, Section 120(i) can have no effect on the remedy selection and ARARs provisions set out in Section 121. Section 120(i) states only that nothing "*in this section*" shall affect RCRA obligations. 42 U.S.C. 9620(i) (emphasis added). Section 120(i) speaks to Section 120 alone, which deals with matters related to federal facilities, and not to the entirety of CERCLA. As EPA's Listing Policy states, Section 120(i) "leaves in

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[6] Moreover, Section 106(a) contains no delegation of federal authority to the States. As the Tenth Circuit has stated, Section 106(a) "does not allow a state, with or without a cooperative agreement, to seek injunctive relief against responsible parties." *State of Colorado* v. *Idarado Mining Co.*, 916 F.2d 1486, 1489 (10th Cir. 1990), cert. denied, 499 U.S. 960 (1991).

place limitations contained in *other* sections of the statute, such as * * * the process for selecting and waiving ARARS * * * and the ban on remedial actions not approved by the President." 54 Fed. Reg. 10,526 (1989).[7]

4. Finally, Colorado is mistaken in suggesting that review is unwarranted because CERCLA is currently before Congress for reauthorization. See Br. in Opp. 27-28. Congress will likely consider CERCLA reauthorization in its next legislative session. See CERCLA § 111(p)(1), 42 U.S.C. 9611(p)(1) (Supp. III 1991) (funding for CERCLA authorized only through fiscal year 1994). But as the Court explained in *Braxton* v. *United States*, 111 S. Ct. 1854 (1991), the possibility that Congress may resolve a conflict among the courts of appeals on a question of statutory interpretation is not generally a basis for this Court to refrain from considering the question. On the contrary, the Court ordinarily regards the task of resolving those conflicts as "initially and primarily ours." *Id.* at 1857.[8]

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[7] Colorado's reading would, in fact, produce the irrational result of specifically exempting federal facilities—and no others—from CERCLA's mechanisms for accommodating federal and state law. See Pet. 22-25.

[8] Indeed, Colorado can only speculate whether Congress's reconsideration of CERCLA will resolve the specific problem at hand. Congress may elect to reauthorize CERCLA without any amendments whatsoever. That was the result the last time CERCLA funding was extended. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388-319. If Congress enacts substantive amendments, they may not address the question presented by the petition.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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